TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 357

THE PACKER CORPORATION, APPELLANT,

vs.

THE STATE OF UTAH

APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

FILED SEPTEMBER 8, 1931

(36,171)

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IN SUPREME COURT OF UTAH

Case No. 5177

STATE OF UTAH, Plaintiff and Respondent,

vs.

THE PACKER CORPORATION, a Corporation, Defendant and Appellant

PETITION FOR ALLOWANCE OF APPEAL, ASSIGNMENT OF ERRORS, AND PRAYER FOR REVERSAL

Considering itself aggrieved by the final decision of the Supreme Court of the State of Utah in rendering its judgment against it in the above entitled cause, The Packer Corporation, a corporation, hereby prays an allowance of appeal from said decision and judgment to the Supreme Court of the United States, and an order fixing the amount of bond on such appeal. And the said, The Packer Corporation, a corporation, hereby assigns the following errors in the records and proceedings in said case:

The Supreme Court of Utah committed error in affirming the decision of the lower court in overruling its demurrer to the complaint, sustaining its conviction, and in holding and deciding that Section 2, Chapter 145, Laws of Utah, 1921, as amended by Chapter 52, Laws of Utah, 1923, as amended by Chapter 92, Laws of Utah, 1929, was valid. The validity of said section was denied and drawn into question by appellant on the ground of its being repugnant to the Constitution of the United States, and in contravention thereof. The said errors are more particularly set forth, as follows:

The Supreme Court of Utah erred when it affirmed the judgment of the lower court in overruling appellant's demurrer and sustained its conviction in holding and deciding:

1. That said Section 2 did not abridge the privileges and immunities of citizens, or of this defendant and appellant, [fol. 2] and that it did not deprive this defendant and ap-

pellant of property without due process of law, nor deny to any person, and especially this defendant and appellant, within its jurisdiction the equal protection of the laws, contrary to the provisions of Section 1 of the Fourteenth Amendment to the Federal Constitution.

2. That said Section 2, as applied to this defendant and appellant, did not impair the obligations of contracts, contrary to the provisions of the Federal Constitution. Article 1, Section 10.

3. That said Section 2, as applied to this defendant and appellant, did not violate its rights with relation to Interstate Commerce, contrary to the provisions of the Federal Constitution, Article 1, Section 8.

4. That said Section 2, as applied to this defendant and appellant, did not abridge the privileges and immunities of citizens of the several states, or of this defendant and appellant, contrary to the provisions of Section 2 of Article 4, of the Federal Constitution.

For all of which errors, the defendant and appellant, The Packer Corporation, a corporation, prays that the judgment of the Supreme Court of the State of Utah, dated July 30, 1931, be reversed, and a judgment rendered in favor of said defendant company, and for costs.

Dan B. Shields, William H. Reeder, Jr., Attorneys for The Packer Corporation, a Corporation, Appellant.

[fol. 3] IN SUPREME COURT OF UTAH

[Title omitted]

ORDER ALLOWING APPEAL

The appeal hereby petitioned for is allowed and ordered upon the execution of a bond by The Packer Corporation, a corporation, in the sum of Two Hundred Fifty ($250.00) Dollars; said bond, when approved, to act as a supersedeas.

D. N. Straup, Acting and Presiding Chief Justice of the Supreme Court of Utah.

[fols. 4 & 5] Supersedeas bond on appeal for $250.00, approved August 25, 1931, omitted in printing.

[fols. 6-8] Citation, in usual form, showing service on George F. Parker, omitted in printing.

[fol. 9] IN SUPREME COURT OF UTAH

#5177

THE STATE OF UTAH, Respondent,

v.

THE PACKER CORPORATION, Appellant

OPINION

FOLLAND, J.:

This is an appeal by the defendant from the District Court of Salt Lake County from a judgment of conviction and sentence to pay a fine for displaying on a billboard owned and operated by defendant an advertisement of Chesterfield cigarettes in violation of Sec. 2 of an act amending Sec. 2, Chap. 145 Laws Utah 1921, as amended by Chap. 52, Laws Utah 1923, as amended by Chap. 92, Laws Utah 1929. The complaint charges:

"That the said Packer Corporation and George W. Hamlyn at the time and place aforesaid, did wilfully and unlawfully display in Salt Lake City, Salt Lake County, Utah, on a bill board owned and operated by the defendant, an advertisement of Chesterfield cigarettes by displaying a representation of a package of Chesterfield cigarettes with the words "Good taste takes the lead"; contrary to the provisions of the Statute of the State aforesaid in such case made and provided, and against the peace and dignity of the State of Utah."

Sec. 2, of Chap. 92, Laws Utah 1929, the section under which this action is brought, reads as follows:

"It shall be a misdemeanor for any person, company, or corporation, to display on any bill board, street car sign, street car, placard, or on any other object or place of display, any advertisement of cigarettes, cigarette papers,

cigars, chewing tobacco, or smoking tobacco, or any disguise or substitute of either, except that a dealer in cigarettes, cigarette papers, tobacco, or cigars or their substitutes, may have a sign on the front of his place of business stating that he is a dealer in such articles, provided that nothing herein shall be construed to prohibit the advertising of cigarettes, cigarette papers, chewing tobacco, smoking tobacco, or any disguise or substitute of either in any newspaper, magazine, or periodical printed or circulating in the State of Utah."

A demurre was interposed to the complaint and overruled by the court, which demurrer contained the following grounds:

"That said complaint does not state facts sufficient to constitute a public offense; that the Statute upon which said complaint is based violates the provisions of Article 1, Section 1, of the Constitution of the State of Utah with respect to the inherent and inalienable right of the defendant to acquire, possess and protect its property; of Article 1, Section 7, of the Constitution of the State of Utah, with respect to deprivation of property without due process of law; of Article 1, Section 18 of the Constitution of the State of Utah, with respect to impairing the obligations of contracts; of Article 1, Section 24 of the Constitution of the State of Utah, relating to uniform operation of all laws of a general nature; (6) of Article 8, Section 5, of the Constitution of the State of Utah, in that said law, as amended, — a direct imposition by the Legislature of the State of Utah, for a tax for the purpose of cities, towns and other municipal corporations; (7) of Article 6, Section 23, of the Constitution of the State of Utah, in that it contains more than one subject and that it is not a general appropriation bill or a bill for the codification and general revision of laws, and that the title does not clearly express the contents of the law; of Article 1, Section 10 of the Constitution of the United States, respecting impairing of the obligation of contracts; of Article 1, Section 8, of the Constitution of the [fol. 10] United States relating to Interstate Commerce; of Article 1, Section 10, of the Constitution of the United States respecting impairing of the obligation of contracts; of Article 4, Section 2, of the Constitution of the United States respecting the privileges and immunities of citizens

in the several states; of the Fourteenth Amendment to the Constitution of the United States respecting the deprivation of property without due process of law and/or respecting the denial to persons within the jurisdiction of the State of Utah of the equal protection of the laws."

The State proved that the defendant, a foreign corporation maintaining an office in charge of a local manager and doing business within the State, owns, operates and maintains numerous billboards at various placed throughout the State, including one at the corner of 2nd West and 7th North Streets in Salt Lake City, upon which is a large lithograph poster 12 ft. by 25 ft. in size, containing a picture of a large gray horse bearing a lady rider, a picture of a package of Chesterfield cigarettes, with the words "Good taste takes the lead," that 2nd West Street is a highway carrying most of the traffic in and out of Salt Lake City to the communities north, and the billboard is in a conspicuous place where anyone passing along the street can see it.

Defendant offered no evidence but on cross examination of the State's witnesses proved, over objection of the State, that Chesterfield cigarettes are shipped into the State from the place of manufacture, that the lithograph poster was printed outside the State and shipped in, and that the contract for advertising these cigarettes was made by the defendant company at its main office in Ohio.

Defendant assigns as error the action of the district court in overruling the demurrer, entering judgment of conviction and passing of sentence. No question is raised as to the sufficiency of the evidence or regularity of the proceedings. Paragraphs 6 and 7 of the demurrer were not argued either orally or in the briefs, and therefore no reference to the matter contained therein is necessary. The arguments presented are wholly concerned with the constitutionality of the act in question and are substantially the same as were considered and passed on by this court in the case of State v. Packer Corporation, — Utah —, 297 Pac. 1013. The decision in that case is therefore controlling.

The evidence being sufficient and the proceedings regular, the judgment of conviction is affirmed upon authority of State v. Packer Corporation, supra.

We concur:

J. W. Cherry, C. J.; Ephraim Hanson, J.

In Supreme Court of Utah

Dissenting Opinion

Straup, J. (dissenting):

I dissent for the reasons stated in my dissenting opinion in the former case, State v. Packer Corporation, 297 Pac. 1013, — Utah — referred to in the prevailing opinion. I admit that substantially the same questions presented and decided in the former case are presented on this appeal. Should the doctrine of stare decisis be appli- I, because thereof, would on this appeal now yield my views expressed in the former case and concur in the prevailing opinion on this appeal. I, however, think the doctrine not applicable. A petition for a rehearing in the former case was filed but not ruled on until just before—the same day—the decision in this case was announced and filed. The former decision not being final until the petition for rehearing was denied, the decisions in both cases in effect are simultaneous.

[fol. 11] While a single decision though by a divided court, when existing undisturbed for some considerable time, and where because of it rights may have been acquired or a course of conduct or of dealings established, may be considered obligatory as a precedent and with respect thereto the doctrine of stare decisis applied, yet, where as here, the former decision, with two members of the court dissenting, not becoming final until the present decision is rendered and filed and until then no rule of law established with respect to the subject and no rights because thereof yet acquired nor any course of conduct or dealings established, the reasons upon which the doctrine rests being absent, the doctrine itself ceases and is rendered inapplicable. 11 Cyc. 745; Kimball v. Grantsville City, 19 Utah 368, 52 Pac. 1; Hopkins v. McCann, 19 Ills. 112; Hill v. State 112 Ga. 400, 37 S. E. 441; Westhus v. Union Trust Co., 168 Fed. 617; Hart v. Burnett, 15 Cal. 530; Becker v. Superior Court, 151 Cal. 313, 90 Pac. 689; McDonald v. Davey, 22 Wash. 366, 60 Pac. 1116; Montgomery County Fiscal Court v. Trimble, 104 Ky. 629; Jackson Co. v. State, 155 Ind. 604.

Further, by the decision in the former case and in this case the validity of the act considered as to whether it was unauthorized by and in conflict with not only provisions of

the State Constitution but of the Federal Constitution as well was directly in question and determined, and thus the determination in the former case was not by a court having final jurisdiction of the question involved. And where a decision of a tribunal is subject to review by a higher and final tribunal, or the question determined may be passed on by a higher and final tribunal in another case, the doctrine of stare decisis does not apply with full force, until the same question or questions have been determined by the court of last resort. 17 R. C. L. 1005; Calhoun Gold Mining Co. v. Ajax Gold Mining Co., 27 Colo. 116, 59 Pac. 607, 50 L. R. A. 209.

For the same reason, law of the case could not be invoked even were this a second appeal of the same case. Roach v. Los Angeles & S. L. R. Co. (on petition for rehearing) — Utah —, 280 Pac. 1063 and cases noted in 41 A. L. R. 1078. But here there were no two appeals of the same case. The appeals are appeals of two distinct and separate cases involving two separate offenses and transactions, though similar in character and involving violations of the same act. So also for such reason, the doctrine of law of the case may not be invoked.

I therefore still dissent and think the act invalid for the reasons stated in my dissenting opinion in the former case.

IN SUPREME COURT OF UTAH

DISSENTING OPINION

ELIAS HANSEN, J. (dissenting):

I was not in accord with the results reached by the majority of the members of this court in the former case of State v. Packer Corporation, — Utah —, 297 Pac. 1013. I am still of the opinion that a different result should have been reached in that case. And for reasons just stated by Mr. Justice Straup I also am of the opinion that the decision in the former case is not as a precedent of controlling effect on this appeal and therefore dissent from the conclusion reached in the prevailing opinion herein affirming the judgment of the court below.

[fol. 12] Minute entry of argument and submission, May 29, 1931, omitted in printing.

[fol. 13] In Supreme Court of Utah, Regular May Term

5177

The State of Utah, Respondent,

v.

The Packer Corporation, Appellant

Judgment—July 30, 1931

This cause having been heretofore argued and submitted and the court being sufficiently advised in the premises, it is now ordered, adjudged, and decreed that the judgment of the district court herein be, and the same is, affirmed.

Opinion of the Court by Folland, J. Cherry, C. J., and Ephraim Hanson, J., concur. Straup, J., and Elias Hansen, J., dissent.

[fol. 14] In Supreme Court of Utah

[Title omitted]

Order Denying Rehearing—August 25, 1931

Petition for Rehearing in this cause coming on to be heard this day, Mr. W. H. Reeder, Jr. and Mr. Dan B. Shields appearing as counsel for appellant in support of the petition, and Mr. Byron D. Anderson, Deputy Attorney General, appearing for the State and resisting the said petition, and the court being sufficiently advised in the premises, it is now ordered, adudged, and decreed that said Petition for Rehearing be, and the same is, denied, and the judgment and decree heretofore entered be, and the same shall bcome and is final as of July 30 ,1931.

Straup, J., and Elias Hansen, J., dissenting.

[fols. 15-19] Petition for rehearing, covering five pages, omitted from this print. It was denied, and nothing more by order of August 25, 1931.

[fol. 20] Judge's certificate to record omitted in printing.

[fol. 21] IN CITY COURT OF SALT LAKE CITY, SALT LAKE COUNTY, STATE OF UTAH

#19680

STATE OF UTAH

vs.

THE PACKER CORPORATION and GEORGE W. HAMLYN

F. A. Trottier, Atty. for State.
Dan B. Shields, Atty. for Defendants.

Transcript

PROCEEDINGS

1921.

April 28. Filed complaint of W. L. Maughan, charging defendants with the crime of Displaying Cigarette advertisement on a Bill Board in Violation of Section 2, of an act amending Section, Chapter 145, Laws of Utah, 1923, as amended by House Bill No. 97 by Mr. Critchlow, passed by the Legislature of the State of Utah.

" 28. Warrant of arrest issued.

May 1. Warrant filed on return.

April 29. Deft. George W. Hamlyn present with counsel. Reading of complaint waived and plea of not guilty entered. Case tried.

State's motion to amend title of complaint by interlineation granted.

W. L. Maughan sworn for state.

State rests.
Defts. rest.
Court found deft. G. W. Hamlyn not guilty.
Court found deft. The Packer Corporation guilty as charged.
Time for sentence waived.
Court sentenced deft. The Packer Corporation to pay a fine of $50.00.

April 30. Filed notice of appeal.
" 30. Filed Undertaking on appeal.
May 4. Transcript to District Court.

James A. Stump, City Judge and ex Officio Justice of the Peace.

[fol. 22] IN CITY COURT OF SALT LAKE CITY

[Title omitted]

NOTICE OF APPEAL

To the above-named plaintiff and to Matthew Cowley, county attorney:

You and each of you will please take notice that the Packer Corporation hereby appeals to the District Court of Utah in and for Salt Lake County from the judgment entered against it in the above entitled action on the 29th day of April, 1931.

This appeal is taken upon questions of law and of fact,
Wm. Reeder, Jr., Dan B. Shields, Attorneys for Defendant.

Copy received this 30th day of April, 1931.
L. O. Thomas, Acct. County Atty., Attorney for Plaintiff.

[fol. 23] IN CITY COURT OF SALT LAKE CITY

Before James A. Stump, City Judge and ex-Officio Justice of the Peace

19680

THE STATE OF UTAH

vs.

THE PACKER CORPORATION and GEORGE W. HAMLYN, Defendant.

COMPLAINT

On this 24th day of April A. D. 1931 before me James A. Stump, City Judge and Ex-Officio Justice of the Peace of the City Court within and for Salt Lake City, Salt Lake County, State of Utah, personally appeared W. L. Maughan who, on being sworn by me, on his oath, did say that The Packer Corporation and George W. Hamlyn on the 22nd day of April A. D. 1931, at the County of Salt Like, State of Utah, did commit the crime of displaying cigarette advertisement on a bill board in violation of Section 2, of an act amending Section 2, Chapter 145, Laws of Utah, 1921, as amended by Chapter 52, Laws of Utah, 1923, as amended by Chapter 92, Laws of Utah 1929, as follows, to wit:

That the said The Packer Corporation and George W. Hamlyn, at the time and place aforesaid, did wilfully and unlawfully display in Salt Lake City, Salt Lake County, State of Utah, on a bill board owned and operated by the defendant, an advertisement of Chesterfield Cigarettes by displaying a representation of a package of Chesterfield Cigarettes with the words "Good taste takes the lead;"

Contrary to the provisions of the Statute of the State aforesaid, in such cases made and provided, and against the peace and dignity of the State of Utah.

W. L. Maughan.

Subscribed and sworn to before me the day and year first above writted. James A. Stump, City Judge and ex-Officio Justice of the Peace.

[fol. 24] IN DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH, Plaintiff,

vs.

THE PACKER CORPORATION, a Corporation, Defendant

DEMURRER

Comes now the Packer Corporation, the defendant herein, and demurs to plaintiff's complaint on file herein and as grounds thereof, alleges:

1. That said complaint does not state facts sufficient to constitute a public offense.

2. That the statute upon which said complaint is based violates the provisions of Article 1, Section 1, of the Constitution of the State of Utah with respect to the inherent and inalienable right of the defendant to acquire, possess, and protect its property.

3. That the statute upon which said complaint is based violates the provisions of Article 1, Section 7, of the Constitution of the State of Utah, with respect to deprivation of property without due process of law.

4. That the statute upon which said complaint is based violates the provisions of Article 1, Section 18 of the Constitution of the State of Utah, with respect to impairing the obligation of contracts.

5. That the statute upon which said complaint is based violates the provisions of Article 1, Section 24 of the Constitution of the State of Utah, relating to uniform operation of all laws of a general nature.

[fol. 25] 6. That the statute upon which said complaint is based violates the provisions of Article 8, Section 5, of the Constitution of the State of Utah, in that said law, as amended, is a direct imposition by the Legislature of the State of Utah, for a tax for the purpose of cities, towns, and other municipal corporations.

7. That the statute upon which said complaint is based violates Article 6, Section 23, of the Constitution of the State of Utah, in that it contains more than one subject

and that it is not a general appropriation bill or a bill for the codification and general revision of laws, and that the title does not clearly express the contents of the law.

8. That the statute upon which said complaint is based violates the provisions of Article 1, Section 10, of the Constitution of the United States, respecting impairing of the obligations of contracts.

9. That the statute upon which said complaint is based violates the provisions of Article 1, Section 8, of the Constitution of the United States relating to Interstate Commerce.

10. That the statute upon which said complaint is based violates the provisions of Article 1, Section 10, of the Constitution of the United States, respecting impairing of the obligation of contracts.

11. That the statute upon which said complaint is based violates the provisions of Article 4, Section 2, of the Constitution of the United States respecting the privileges and immunities of citizens in the several states.

12. That the statute upon which said complaint is based violates the provisions of the Fourteenth Amendment to the Constitution of the United States, respecting the deprivation of property without due process of law and/or [fol. 26] respecting the denial to persons within the jurisdiction of the State of Utah of the equal protection of the laws.

Wherefore defendant prays that said complaint be dismissed.

W. H. Reeder, Jr., Dan B. Shields, Attorneys for Defendant.

Copy of the foregoing demurrer received this 8th day of May, 1931.

Ray Van Cott, Attorney for Plaintiff.

[fol. 27] In District Court of Salt Lake County

[Title omitted]

Motion to Dismiss Action and Discharge Defendant

Now comes the defendant herein and moves the Court to dismiss the above entitled action and discharge the defendant herein upon the grounds and for the reasons:

1. That the complaint herein does not state facts sufficient to constitute a public offense.

2. That there is insufficient evidence introduced in this action upon which to sustain a conviction that the defendant is guilty of the offense alleged in the complaint.

3. That the statute upon which said complaint is based violates the provisions of Article 1, Section 1, of the Constitution of the State of Utah, with respect to the inherent and inalienable right of the defendant to acquire, possess and protect its property.

4. That the statute upon which said complaint is based violates the provisions of Article 1, Section 7, of the Constitution of the State of Utah, with respect to deprivation of property without due process of law.

5. That the statute upon which said complaint is based violates the provisions of Article 1, Section 18, of the Constitution of the State of Utah, with respect to impairing the obligation of contracts.

6. That the statute upon which said complaint is based violates the provisions of Article 1, Section 24, of the Con-
[fol. 28] stitution of the State of Utah, relating to uniform operation of all laws of a general nature.

7. That the statute upon which said complaint is based violates the provisions of Article 1, Section 10, of the Constitution of the United States, respecting impairing of the obligation of contracts.

8. That the statute upon which said complaint is based violates the provisions of Article 1, Section 8, of the Constitution of the United States relating to Interstate Commerce.

9. That the statute upon which said complaint is based violates the provisions of Article 1, Section 10, of the Constitution of the United States, respecting impairing of the obligation of contracts.

10. That the statute upon which said complaint is based violates the provisions of Article 4, Section 2, of the Constitution of the United States respecting the privileges and immunities of citizens in the several states.

11. That the statute upon which said complaint is based violates the provisions of the Fourteenth Amendment to the Constitution of the United States, respecting the deprivation of property without due process of law and/or respecting the denial to persons within the jurisdiction of the State of Utah of the equal protection of the laws.

This motion is based upon the complaint on file herein, the evidence ontroduced herein and upon all records and files in this cause.

W. H. Reeder, Jr., Dan B. Shields, Attorneys for Defendant.

[fol. 29] In District Court of Salt Lake County

Case Number 9064

The State of Utah, Plaintiff,

vs.

The Packer Corporation, Defendant

Entered order. Dated May 8, 1931.

David W. Moffat, Judge.

Judgment

This case comes now on for trial on defendant's appeal from judgment rendered in the City Court of Salt Lake City, Ray Van Cott, District Attorney, appearing in behalf of the State, and Dan B. Shields appearing in behalf of the defendant. Comes now Dan B. Shields and waives the reading of the complaint and enters a plea of "Not Guilty" in behalf of the defendant. Defendant's demurrer

to the complaint is submitted to the Court without argument and by the Court overruled. Pursuant to stipulation of the attorneys, trial by jury is waived. Wesley L. Maughr and George W. Hamlyn are sworn and examined in behalf of the State. The State rests. Comes now counsel for the defendant and moves the Court to dismiss the complaint and discharge the defendant. Said motion is submitted to the Court without argument by counsel for the defendant, and by the Court denied. The defendant rests. Both sides rest. The testimony being concluded and the Court being now fully advised in the premises; finds the defendant guilty of the crime as charged in the complaint on file herein. Said defendant waives time for sentence, and the Court thereupon pronounces the following judgment and sentence upon the defendant:

"It is the judgment and sentence of this Court that you, the Packer Corporation, be sentenced to pay a fine in the sum of $100.00."

Upon motion of counsel for the defendant, it is ordered that the execution of said sentence be stayed pending appeal.

[fol. 30] In District Court of Salt Lake County

[Title omitted]

Certificate of Probable Cause

The undersigned, David W. Moffat, one of the judges of the above entitled court, and the Judge before whom the above matter was heard, hereby certify that in my opinion there is probable cause for the appeal to the Supreme Court of Utah, which is about to be taken.

Dated this 13th day of May, 1931.

David W. Moffat, Judge.

Attest:

Alonzo Mackay, Clerk, by E. R. Warner, Deputy Clerk.

[fol. 31] IN DISTRICT COURT OF SALT LAKE COUNTY

[Title omitted]

NOTICE OF APPEAL

To the State of Utah and to Ray Van Cott, District Attorney:

You and each of you will please take notice that the defendant, The Packer Corporation, hereby appeals to the Supreme Court of the State of Utah from the judgment of conviction entered against it on the 8th day of May, 1931.

This appeal is taken both upon questions of fact and of law.

Govern yourselves accordingly.

W. H. Reeder, Jr., Dan B. Shields, Attorneys for Defendant.

Copy received this 12 day of May, 1931.

Ray Van Cott, District Attorney.

[fol. 32] IN DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH

Case No. 9064

STATE OF UTAH, Plaintiff,

vs.

THE PACKER CORPORATION and GEORGE W. HAMLYN, Defendants

Bill of Exceptions

Be it remembered, that the above entitled matter came regularly on for hearing before the Honorable David W. Moffat, one of the Judges of the above entitled Court, on the 8th day of May, A. D. 1931.

APPEARANCES OF COUNSEL

For the Plaintiff: Ray Van Cott, Sr., District Attorney in and for Salt Lake County, State of Utah.

For the Defendants: Dan B. Shields, Esq.

Thereupon the following proceedings were had:

Mr. Shields: I take it, in the light of the circumstances attached to this complaint, the demurrer can be submitted.

The Court: The demurrer raises the same questions that were heretofore raised?

Mr. Shields: Exactly.

The Court: This court sustained the demurrer, and the matter went to the Supreme Court, and the Supreme Court reversed the decision. This court now faces the situation of reversing its own decision in pursuance of authority of the Supreme Court, and the further situation is now that the Supreme Court of the United States may have the opportunity of still further reversing or affirming it, as the case may be.

[fol. 33] Mr. Van Cott: I take it then that the demurrer is overruled.

The Court: You submit the demurrer without argument? The demurrer may be overruled on the authority of the case heretofore decided by the Supreme Court raising the same question.

Mr. Van Cott: Mr. Shields is representing the defendants?

Mr. Shields: Yes.

Mr. Van Cott: Do you wish a jury in this case?

Mr. Shields: We waive a jury.

Mr. Van Cott: The State is ready to proceed.

The Court: You may proceed.

Mr. Van Cott: I will call Mr. Wesley L. Maughan.

Wesley L. Maughan was thereupon called as a witness for and on behalf of the plaintiff and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Van Cott:

Q. State your name.

A. Wesley L. Maughan.

Q. You are an officer in the County Sheriff's office?

A. Yes sir.

Q. What position do you hold?

A. Deputy sheriff.

Q. Did you have occasion to swear to this complaint against the Packer Corporation?

A. Yes sir.

Q. I will ask you to state if you made any investigation to ascertain if it had its advertisement upon a billboard in this County of a certain cigarette advertisement?

A. Yes sir.

Q. Where is that billboard?

[fol. 34] A. On the southeast corner of 7th North and 2nd West.

Mr. Shields: For the purpose of the record, I desire to move that the evidence heretofore submitted, except the formal testimony that Mr. Maughan is an officer—I desire to move that his answers to all the questions be stricken and no evidence be received along this type, upon the ground and for the reason that such evidence would be in violation and contravention of the Constitution of the State of Utah and the Constitution of the United States, as set forth already in the demurrer heretofore filed.

The Court: Objection overruled.

Mr. Shields: Take an exception. May we have, for the purpose of the record, the same objection to each question.

The Court: For the purpose of the record you may.

By Mr. Van Cott:

Q. Was that street in Salt Lake County, State of Utah?

A. Yes, it was.

Q. Salt Lake City?

A. Salt Lake City.

Q. Will you describe the nature of the advertisement on that board at that time?

A. It is a large board, with a gray horse bearing a lady rider, and either in the center or on one side is a picture of a package of Chesterfield Cigarettes, with the slogan, or wording, to the effect that "Good taste takes the lead."

Q. What was the approximate size of that billboard upon which was displayed this cigarette advertisement, with the horse and its rider?

A. Approximately it was 15 by maybe 30 feet in dimensions.

Q. State whether or not—or state how it was displayed so far as the public is concerned, with reference to streets?

[fol. 35] A. In a very conspicuous place, where anyone driving from Salt Lake County to the north could see it.

Q. Displayed so those traveling on which streets could see it?

A. 2nd West and 7th North.

Q. What is the character of 2nd West Street, and what was it at all times mentioned in the complaint?

A. It is the street taking most of the traffic out of Salt Lake County into the counties north, a through highway.

Mr. Shields: Before the testimony is introduced, I would like to have it appear that the record show that a plea of not guilty is entered there before any other proceeding.

The Court: The court was under the impression that the defendant has already pleaded. The record may show, before any testimony is introduced, and after the overruling of the demurrer, that a plea of not guilty to the complaint is entered by the defendants.

By Mr. Van Cott:

Q. State, Mr. Maughan, whether or not there was any other display upon that board than the one you have described?

A. No, there wasn't anything other than the name of the company operating the billboard.

Q. State what name was on the board?

A. On a piece of green board it had the name of "Packer" on it.

Q. "Packer Corporation"?

A. No, just "Packer".

Q. State whether or not you discussed the matter with any person who represented the Packer Company as to that display?

A. No, I didn't.

Q. Was that scene on that board, and displayed there on the 22nd of April, 1931?

A. It was.

Q. Do you know for how long it was displayed?

[fol. 36] A. No, I don't.

Mr. Van Cott: That is all.

Mr. Shields: That is all.

(Witness excused.)

GEORGE W. HAMLYN was thereupon called as a witness for and on behalf of the plaintiff and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Van Cott:

Q. State your name.
A. George W. Hamlyn.
Q. You reside in Salt Lake City?
A. Yes sir.
Q. What is your business?
A. Poster for outdoor advertising.
Q. Have you any association or connection as officer with the Packer Corporation in this case?
A. I am manager for the Utah territory.

Mr. Shields: Now, if the court please, in order that the record may be maintained, I now move that, outside of this formal testimony, no further evidence be introduced in connection with this case, of this witness or any other, on the ground that it is incompetent, irrelevant and immaterial, and for the reasons set forth in the demurrer heretofore filed.

The Court: The objection may be overruled.

Mr. Shields: May I have an exception and objection to this testimony?

The Court: You may have, for your record, an exception to the testimony and the ruling.

By Mr. Van Cott:

Q. For how long have you been manager of the Utah territory?
A. Approximately three years.
[fol. 37] Q. So that you were local manager on the 22nd of April, this year?
A. I was.
Q. Did you hear Mr. Maughan's testimony?
A. I did.
Q. You may state whether or not that sign or billboard he described is one of the billboards or advertising boards, owned and operated by your company, Packer Corporation, under you as local manager?

A. Yes, it is.

Q. And was it at all times mentioned in the complaint on the 22nd of April, 1931?

A. It was.

Q. And Packer Corporation, the defendant here, is a corporation?

A. It is a corporation.

Q. And doing business, and has been doing business under the laws of the State of Utah?

A. Yes sir.

Q. And was engaged as such corporation on the 22nd day of April, 1931, in this city, county and state?

A. It was.

Q. Dod you hear Mr. Maughan's description of that display upon that particular billboard as of April 22, 1931?

A. I did.

Q. I will ask you to state if that description given by him is correct?

A. Correct, with one exception as to size.

Q. What is its size or dimensions?

A. 12 by 25 feet, to be exact.

Q. In the other respects his testimony was correct?

A. Right.

Mr. Van Cott: That is all.

Cross-examination.

[fol. 38] By Mr. Shields:

Q. This advertisement which was shown on this billboard, where did you receive that from?

A. We received it from the Foster & Kleiser Company of San Francisco, California, through a contract for Liggett——

Mr. Van Cott: We object to this line of evidence as irrelevant, incompetent and immaterial, this line of cross examination, and move that the answer be stricken.

The Court: Objection overruled.

Mr. Van Cott: Save an exception. And I object to this line of evidence as not proper cross examination, and incompetent, irrelevant and immaterial.

The Court: The evidence is admitted for the reason that it bears directly upon contract relations between parties

varying in different localities as to and in relation to the use of property as it may affect the contract between people in different states.

Mr. Van Cott: Our objection and position in this matter is this: That this billboard is within the State of Utah, County of Salt Lake, and there is a display of advertisements that offend against the law. As to where the advertisement came from, or through whose authority it was sent here, or by whom, seems to us wholly immaterial.

The Court: The court doesn't know, at this time, whether it is a domestic or foreign corporation. It may be a foreign corporation.

Mr. Van Cott: I think that would make no difference.

The Court: It may do.

Mr. Van Cott: It wouldn't be a good defense if it is a foreign corporation.

The Court: This is a question being submitted to the court for the purpose of determining the constitutionality of the statute under which the action is brought. The [fol. 39] court sees no reason why the matters involved should not be presented so that the statute and its relation to the constitution in all its aspects may be full and fairly presented and determined.

Mr. Van Cott: May we have the same objection and exception, without repeating it, to this whole line of testimony.

The Court: You may, if that makes the exception good.

Mr. Van Cott: We will take it in that wholesale manner, and specify it later.

Mr. Shields: Will you read the question, please.

(Question read.)

A. Liggett & Myers Tobacco Company, the lithograph display was received from the Liggett & Myers Tobacco Company in San Francisco, California.

Q. Now, of your own knowledge, were any of these cigarettes advertised, were they, or are they manufactured in Utah?

Mr. Van Cott: I object to that as incompetent, irrelevant and immaterial, not cross examination, and wholly incompetent.

The Court: Objection overruled.

Mr. Van Cott: Save an exception.

A. From the indication on the package of cigarettes, they are manufactured in California.

Q. Are they manufactured in Utah?

A. None manufactured in Utah.

Mr. Van Cott: We will save the same objection and exception to that last question.

The Court: You may have your exception.

Q. This corporation, the Packer Corporation, I understand is a foreign corporation?

A. Correct.

Q. From what State?

[fol. 40] A. Incorporated in the State of Delaware.

Q. Qualified in the State of Utah to do business?

A. We have.

Q. And this advertising which you are doing, the Chesterfield advertisement referred to in this complaint, is the result of a contract made between your foreign corporation at its place of business in Cleveland, Ohio, I understand, and is performed here as a part of a general contract in effect in the United States generally for the advertising of this commodity?

Mr. Van Cott: We object to it, if your Honor please, as incompetent, irrelevant, immaterial, and not proper cross examination.

The Court: Objection overruled.

A. That is it substantially, but there is an individual contract for each particular locality that goes to that particular place.

Q. But your contract is made in Cleveland, Ohio?

A. Generally, yes.

Q. And it is on that contract that this advertising is done?

Mr. Van Cott: Object to that as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

Mr. Van Cott: Save an exception.

A. Correct.

Mr. Shields: That is all.

Mr. Van Cott: The State rests.

Mr. Shields: Just a moment, I would like to recall Mr. Hamlyn.

Mr. Van Cott: The State withdraws its offer to rest.

GEORGE W. HAMLYN, recalled, testified further on cross examination by Mr. Shields, as follows:

[fol. 41] Q. This advertising that you are doing, of Chesterfield Cigarettes, is done in Salt Lake County, State of Utah, and other counties in the State, when it is done, as the result of this contract to which you refer?

Mr. Van Cott: If the court please, we object to that as not proper cross examination, and as immaterial and irrelevant.

The Court: Objection overruled.

Mr. Van Cott: Save an exception.

A. Yes.

Q. Do you know, as a matter of fact, and of your own knowledge, that Chesterfield Cigarettes are not manufactured in Utah, and are shipped into the State from outside points?

A. I do.

Mr. Van Cott: I object to that as incompetent, irrelevant and immaterial, and not cross examination. The question of disposition of cigarettes is in no way involved in this case, it is the display, and advertising.

The Court: Objection may be overruled.

Mr. Van Cott: Save an exception.

Mr. Shields: That is all.

Mr. Van Cott: The State rests.

Mr. Shields: The defense rests.

The Court: From the evidence submitted——

Mr. Shields: Just a moment, before the court makes its ruling, I desire now to file a formal motion upon the various grounds set forth in the motion to dismiss the action and discharge the defendants. They are set out here and I will read this into the record:

MOTION TO DISMISS

"Now comes the defendant herein and moves the court to dismiss the above entitled action and discharge the defendant herein upon the grounds and for the reasons:

1. That the complaint herein does not state facts sufficient to constitute a public offense.

2. That there is insufficient evidence introduced in this [fol. 42] action upon which to sustain a conviction that the defendant is guilty of the offense alleged in the complaint.

3. That the statute upon which said complaint is based violates the provisions of Article 1, Section 1, of the Constitution of the State of Utah, with respect to the inherent and inalienable right of the defendant to acquire, possess and protect its property.

4. That the statute upon which said complaint is based violates the provisions of Article 1, Section 7, of the Constitution of the State of Utah, with respect to deprivation of property without due process of law.

5. That the statute upon which said complaint is based violates the provisions of Article 1, Section 18, of the Constitution of the State of Utah, with respect to impairing the obligation of contracts.

6. That the statute upon which said complaint is based violates the provisions of Article 1, Section 24, of the Constitution of the State of Utah, relating to uniform operation of all laws of a general nature.

7. That the statute upon which said complaint is based violates the provisions of Article 1, Section 10 of the Constitution of the United States, respecting impairing of the obligation of contracts.

8. That the statute upon which said complaint is based violates the provisions of Article 1, Section 8, of the Constitution of the United States relating to Interstate Commerce.

9. That the statute upon which said complaint is based violates the provisions of Article 4, Section 2, of the Constitution of the United States respecting the privileges and immunities of citizens in the several states.

10. That the statute upon which said complaint is based violates the provisions of the Fourteenth Amendment of [fol. 43] the Constitution of the United States, respecting the deprivation of property without due process of law and/or respecting the denial to persons within the juris-

diction of the State of Utah of the equal protection of the laws.

This motion is based upon the complaint on file herein, the stipulation of facts heretofore filed herein and upon all records and files in this cause.

Mr. Van Cott: The State opposes the motion.

The Court: The motion of the defendant may be denied.

Mr. Shields: Take an exception.

Mr. Van Cott: Do you waive the time for passing of sentence?

Mr. Shields: Yes, we will waive the time for sentence.

The Court: The defendants having waived time for sentence—the corporation, as provided by the statute, a fine is all that may be imposed. In pursuance of Subdivision F of Section 1, Chapter 5 of the Special Session Laws of 1930, under which this action is brought, the judgment of the court is that the defendant be fined the sum of one hundred dollars.

Mr. Shields: If the court please, I wonder if execution may be stayed pending appeal.

Mr. Van Cott: We have no objection.

The Court: That is the only thing in this matter there is no objection to. You may have a stay of execution.

[fol. 44] Reporter's certificate to foregoing omitted in printing.

ORDER SETTLING BILL OF EXCEPTIONS

The foregoing, having by stipulation of the parties in the above entitled action, been made the Bill of Exceptions the same is hereby settled and allowed.

Dated May 13th, 1931.

David W. Moffat, Judge.

Attest:

Alonzo Mackay, Clerk, by E. R. Warner, Deputy Clerk.

[fol. 45] IN DISTRICT COURT OF SALT LAKE COUNTY

[Title omitted]

STIPULATION RE BILL OF EXCEPTIONS

Come now the parties to the above entitled action by their respective attorneys, and stipulate and agree that

the transcript of the proceedings had in the above entitled matter, made by Grace Hurlbert as official Court Reporter of the evidence, testimony, and proceedings had in the above entitled action on the 8th day of May, 1931, may be considered as and settled and allowed by the Court as the Bill of Exceptions on appeal.

Dated this 12 day of May, 1931.

Ray Van Cott, District Attorney; W. H. Reed, Jr., Dan B. Shields, Attorneys for Defendant.

[fol. 46] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 47] IN SUPREME COURT OF UTAH

[Title omitted]

RETURN TO ALLOWANCE OF APPEAL

In obedience to the commands of the within allowance of appeal, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

It witness whereof I hereunto subscribe my name, and affix the seal of said Supreme Court of Utah, in the City of Salt Lake, this 25 day of August, 1931.

L. M. Cummings; Clerk Supreme Court of Utah.

(Seal, Supreme Court State of Utah.)

Costs of Suit

Plaintiff's costs, none.
Defendant's costs, none.
Costs of transcript, $12.50.

L. M. Cummings, Clerk.

[fol. 48] IN SUPREME COURT OF UTAH

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD

To Mr. L. C. Cummings, clerk of the Supreme Court of the State of Utah:

You will please prepare the record upon appeal of the above named appellant to the Supreme Court of the United

States from the final judgment and decision of the Supreme Court of the State of Utah entered in said cause in favor of the State of Utah, respondent, and include in such record the following:

The original petition for appeal to the Supreme Court of the United States, with assignments of errors and prayer for reversal attached thereto.

The original allowance of appeal.

A copy of the bond and its approval.

The original citation with proof of service thereon.

A copy of the opinion of the Supreme Court of Utah in such cause.

A copy of the minutes of said court with reference to said cause.

A copy of the petition for re-hearing of the above named appellant.

A copy of the Record on Appeal to said State Supreme Court from the Third Judicial District Court of the State of Utah in and for Salt Lake County.

[fol. 49] Statements showing the filing of such bond, and the lodgement of copies of the allowance of appeal in your office.

Return of such allowance of appeal and the statement of costs.

A copy of this præcipe.

Please certify the same to the said Supreme Court of the United States under your seal and in accordance with the rules of said Court and the laws of the United States upon such appeals.

Dan B. Shields, William H. Reeder, Jr., Attorneys for Appellant.

Residence and Post Office address: 419 Judge Building, Salt Lake City, Utah.

[fol. 50] Certificate of lodgment omitted in printing.

[fol. 51] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 52] IN THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS RELIED UPON BY APPELLANT AND DESIGNATION TO PRINT ENTIRE RECORD

Comes now the appellant, and in pursuance to Section 9 of Rule 13 of the above entitled court, sets forth the points on which it intends to rely, and the parts of the record which it thinks necessary for consideration thereof, attached to which is a proof of service upon the appellee, The State of Utah:

That Section 2 of Chapter 145, Laws of Utah, 1929, as amended by Chapter 52, Laws of Utah, 1923, as amended by Chapter 92, Laws of Utah, 1929, is unconstitutional and void; that said section violates the provisions of Article 1, Section 10 of the Constitution of the United States respecting the impairing of the obligations of contracts; that said section violates the provisions of Article 1, Section 8 of the Constitution of the United States relating to interstate Commerce; that said section violates the provisions of Article 4, Section 2 of the Constitution of the United States respecting the privileges and immunities of the citizens of the several states; that said section violates the provisions of the Fourteenth Amendment to the Constitution of the United States respecting the deprivation of property without due process of law, and/or respecting the denial to persons within the durisdiction of the State of Utah of the equal protection of the law; that the classifications set forth in said section are unreasonable, discriminatory, and unjust and that the prohibition against bill boards, etc., therein bears no reasonable relation to the objects sought to be accomplished.

[fol. 53] That appellant's demurrer, and particularly Paragraph 8 thereof, wherein it was contended, "That the statute upon which said complaint is based violated the provisions of Article 1, Section 10 of the Constitution of the United States respecting impairing of the obligations of contracts;" and Paragraph 9 thereof, "That the statute upon which said complaint is based violates the provisions of Article 1, Section 8 of the Constitution of the United States relating to Interstate Commerce;" and Paragraph 11 thereof, "That the statute upon which said complaint is based violates the provisions of Article 4, Section 2 of

the Constitution of the United States respecting the privileges and immunities of citizens of the several states;" and Paragraph 12 thereof, "That the statute upon which said complaint is based violates the provisions of the Fourteenth Amendment of the Constitution of the United States respecting the deprivation of property without due process of law, and/or respecting the denial to persons within the jurisdiction of the State of Utah of the equal protection of the law," should have been sustained by the court, and the action of the lower court in overruling said demurrer should have been overruled by the Supreme Court of the State of Utah.

That appellant's motion to dismiss the action and discharge the defendant, and particularly Paragraph 7 thereof, "That the statute upon which said complaint is based violates the provisions of Article 1, Section 10 of the Constitution of the United States respecting impairing of the obligations of contracts;" and Paragraph 8 thereof, "That the statute upon which said complaint is based violates the provisions of Article 1, Section 8 of the Constitution of the United States relating to Interstate Commerce;" and Paragraph 10 thereof, "That the statute upon which said complaint is based violates the provisions of Article 4, Section [fol. 54] 2 of the Constitution of the United States respecting the privileges and immunities of the citizens of the several states;" and Paragraph 11 thereof, "That the statute upon which said complaint is based violates the provisions of the Fourteenth Amendment to the Constitution of the United States respecting the deprivation of property without due process of law, and/or respecting the denial to persons within the jurisdiction of the State of Utah of the equal protection of law;" and that the action of the trial court in denying said motion should have been overruled by the Supreme Court of the State of Utah, and the defendant discharged.

That the action of the trial court in finding the defendant guilty was unjustified, illegal, and in violation of the Constitution of the United States, and the Supreme Court of the State of Utah was in error in sustaining such conviction, and particularly was the Supreme Court of the State of Utah in error in holding that said conviction did not violate the provisions of Article 1, Section 10 of the Constitution of the United States respecting impairing of the

obligation of contracts; and did not violate the provisions of Article 1, Section 8 of the Constitution of the United States relating to Interstate Commerce; and did not violate the provisions of Article 4, Section 2 of the Constitution of the United States respecting the privileges and immunities of the citizens of the several states; and did not violate the provisions of the Fourteenth Amendment to the Constitution of the United States respecting the deprivation of property without due process of law, and/or respecting the denial to persons within the jurisdiction of the State of Utah of the equal protection of law.

That all of said objections were preserved in the record, and were raised both in the trial court and in the Supreme [fols. 55-57] Court of the State of Utah, and that for the purpose of consideration of said points, appellant directs that the entire record should be printed, because it will all be necessary to a consideration of the points which appellant intents to present.

The Packer Corporation, a corporation, Appellant. By Dan B. Shields, William H. Reeder, Jr., Attorneys for Appellant.

Copy of the foregoing statement of points upon which appellant intends to rely received this 13th day of October, 1931, and Appellee hereby consents that the same may be received by the Clerk and filed as the original statement of points relied upon by appellant, and substituted in place of said original statement; and that only this statement of points relied upon by appellant need be printed; and appellee hereby waives its right to designate additional parts of the record.

State of Utah, Appellee. By Geo. P. Parker, Attorney General; Byron W. Anderson, Assistant Attorney General, Attorneys for Appellee.

[fol. 58] [File endorsement omitted.]

Endorsed on cover: File No. 36,171. Utah Supreme Court. Term No. 357. The Packer Corporation, appellant, vs. The State of Utah. Filed September 8, 1931. File No. 36,171.

FILE COPY

OCT 2
CHARLES ELMO

In the Supreme Court of the United States

OCTOBER TERM, 1931

Case No. 357

THE PACKER CORPORATION,
a Corporation,
Appellant.

vs.

STATE OF UTAH,
Appellee,

Statement as to Jurisdiction on Appeal With Acknowledgment of Service

DAN B. SHIELDS,
WILLIAM H. REEDER, JR.,
Attorneys for Appellant.

LEGAL PRINTING CO., SALT LAKE

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In the Supreme Court of the United States

OCTOBER TERM, 1931

Case No. 357

THE PACKER CORPORATION,
a Corporation,

Appellant,

vs.

STATE OF UTAH,

Appellee,

STATEMENT AS TO JURISDICTION ON APPEAL WITH ACKNOWLEDGMENT OF SERVICE

The appellant, in support of the jurisdiction of this Court to review the above entitled cause of appeal, respectfully states:

A. That under Section 237 of the Judicial Code, as amended February 13, 1925, 43 Stat. 937 (28 U. S. C. A. Sec. 344), this Court has jurisdiction to review a decision of the highest Court of the state wherein the validity of

a state statute is drawn in question on the ground of it being repugnant to the Constitution of the United States. In this case it was contended by appellant that Section 2, of an Act amending Section 2, Chapter 145, Laws of Utah, 1921 and as amended by Chapter 52, Laws of Utah, 1923, as amended by Chapter 92, Laws of Utah, 1929, was invalid on the ground that it was repugnant to Article 1 Section 10; Article 1 Section 8; Article 4 Section 2; and the Fourteenth Amendment of the Federal Constitution.

B. The judgment sought to be reviewed was rendered by the Supreme Court which is the court of final resort of the State of Utah on July 30, 1931, (Record, p. 13). Appellant's petition for rehearing was entertained and denied and decree made final on the 25th day of August, 1931 (Record, p. 14). The petition for allowance of appeal was presented on the 25th day of August, 1931, (Record, p. 1), and allowed the same day. (Record, p. 3).

C. Section 2, Chapter 145, Laws of Utah, 1921, as amended by Chapter 52, Laws of Utah, 1923, as amended by Chapter 92, Laws of Utah, 1929, is as follows:

> SEC. 2. *Unlawful to display advertising — where.* It shall be a misdemeanor for any person, company, or corporation, to display on any bill board, street car sign, street car, placard, or on any other object or place of display, any advertisement of cigarettes, cigarette papers, cigars, chewing tobacco, or smoking tobacco, or any disguise or substitute of either, except that a dealer in cigarettes, cigarette papers, tobacco, or cigars or their substitutes, may have a sign on the front of his place of business stating that he is a dealer in such articles, provided that nothing herein shall be construed to prohibit the advertising of cigarettes, cigarette papers, chewing tobacco, smoking tobacco, or any disguise or substitute of either in any newspaper,

magazine or periodical printed or circulating in the State of Utah.

Appellant is a Delaware corporation, authorized to do and doing business in the State of Utah; that on the 22nd day of April, 1931, the appellant was the owner of a certain bill board in Salt Lake City, Salt Lake County, State of Utah, and displayed thereon an advertisement of Chesterfield Cigarettes by displaying a representation of a package of Chesterfield Cigarettes with the words "Good Taste Takes the Lead;" that said advertisement was posted on said bill board under the authority and direction of the manager of the appellant in the State of Utah; that the bill board was located on a certain public highway in said Salt Lake City, facing the highway where it could be seen by the public, on the 22nd day of April, 1931; that the poster displayed on the bill board was manufactured out of the State of Utah and shipped into the State of Utah and was placed on the bill board under the terms of a contract entered into by the appellant at its home office in Cleveland, Ohio, with Foster & Kleiser Company, of San Francisco, California, for Liggett & Myers Tobacco Company, the manufacturer of Chesterfield Cigarettes, in which contract the defendant agreed to display said poster; that said poster was shipped into the State of Utah from Liggett & Myers Tobacco Company, of San Francisco, California; that like posters were displayed by appellant in various cities and counties in the State of Utah in accordance with the terms of said contract; that said display of said poster and all others displayed by appellant was done as a part of a general contract in effect in the United States generally for the advertising of Chesterfield Cigarettes; that the Chesterfield Cigarettes advertised on said poster are not manufactured in the State of Utah but are shipped into the State

of Utah and sold generally in the State of Utah.

That on the 24th day of April, 1931, a complaint (Record, p. 23) was signed and filed against the appellant and George W. Hamlyn, its manager, charging that on the 22nd day of April, 1931, in the County of Salt Lake, State of Utah, the defendants did commit the crime of displaying a cigarette advertisement on a bill board in violation of the Section of the Laws of Utah, hereinabove referred to, by wilfully and unlawfully displaying in Salt Lake City, Salt Lake County, State of Utah, on said bill board, said advertisement of Chesterfield cigarettes; that appellant, as defendant in said action, was found guilty of the charge and sentenced to pay a fine; that said cause was appealed to the Supreme Court of the State of Utah and the Supreme Court of the State of Utah sustained the conviction of the lower court, that the order of said Supreme Court of the State of Utah was and is null and void and erroneous, in that it held that said Section of the Laws of Utah above referred to, did not impair the obligation of appellant's contract contrary to Article 1 Section 10 of the Federal Constitution; did not interfere with interstate commerce in violation of Article 1 Section 8 of the Federal Constitution, did not abridge the privileges and immunities of appellant contrary to the provisions of Article 4, Section 2 of the Federal Constitution, and did not deprive the appellant of property without due process of law or deny to appellant within the jurisdiction of the State of Utah, the equal protection of the laws of Utah in violation of the provisions of the Fourteenth Amendment to the Federal Constitution, the rights of the appellant in that behalf being guaranteed and protected by said provisions of the Constitution of the United States.

D. The following decisions of this Court are believed to sustain the jurisdiction of this appeal:

Marvin vs. Trout, 199 U. S. 212, 50 L. Ed. 157.

White River Lumber Co. vs. Arkansas, 279 U. S. 692, 49 S. Ct. 457, 73 L. Ed. 903.

Adams vs. Russell, 229 U. S. 353, 33, S. Ct. 846, 57 L. Ed. 1224.

Wayhauser vs. Minnesota, 176 U. S. 550, 20 S. Ct. 485, 44 L. Ed. 583.

U. S. F. & G. vs. Oklahoma, 250 U. S. 111, 39 S. Ct. 399, 63 L. Ed. 876.

Richardson vs. Scott, 276 U. S. 128, 48 S. Ct. 264, 72 L. Ed. 497.

Chicago R. I. & P. Ry. Co. vs. Devine, 239 U. S. 52, 36 S. Ct. 27, 60 L. Ed. 140.

American Sugar Ref. Co. vs. Louisiana, 179 U. S. 89, 21 S. Ct. 43, 45 L. Ed. 102.

New York ex rel. Bryant vs. Zimmerman, 278 U. S. 63, 49 S. Ct. 61, 73 L. Ed. 52.

It is therefore respectfully submitted that this Court has jurisdiction to hear and determine this appeal.

DAN B. SHIELDS,

WILLIAM H. REEDER, JR.,

Attorneys for Appellant,

THE PACKER CORPORATION,
a Corporation.

The undersigned counsel of record for the Appellee hereby acknowledge service of a copy of the foregoing statement as to jurisdiction on appeal.

Dated at Salt Lake City, Utah, this .....day of September, 1931.

.....

Attorney General

.....

Assistant Attorney General

Attorneys for Appellee.

STATE OF UTAH.

FILE COPY

JAN 4

In the Supreme Court of the United States

OCTOBER TERM, 1931.

No. 357

THE PACKER CORPORATION,
Appellant,

vs.

THE STATE OF UTAH.

APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH.

BRIEF OF APPELLANT.

GARDNER ABBOTT,
WILLIAM H. REEDER, JR.,
DAN B. SHIELDS,
W. T. KINDER,
Counsel for Appellant.

Of Counsel:
MARVIN BOWER.

Cleveland, Ohio,
December 19, 1931.

THE GAYNE LEGAL PUBLISHING CO., CLEVELAND, O.

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In the Supreme Court of the United States

OCTOBER TERM, 1931.

No. 357

THE PACKER CORPORATION,
Appellant,

vs.

THE STATE OF UTAH.

APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH.

BRIEF OF APPELLANT.

The opinion of the Supreme Court of the State of Utah appears in the Record (pp. 3-7), and is reported in .... Utah ...., 2 P. (2d) 114 (1931).

This is an appeal under Judicial Code Section 237 from the judgment of the Supreme Court of the State of Utah affirming the conviction of appellant in the District Court of Salt Lake County, Utah, under Section 2, Chapter 145, Laws of Utah 1921*, as amended by Chapter 52, Laws of Utah 1923, as amended by Chapter 92, Laws of Utah 1929, which Section is hereinafter referred to as "Section 2" and reads as follows:

> "Sec. 2. *Unlawful to display advertising—where.* It shall be a misdemeanor for any person, company, or corporation, to display on any bill board, street car

*Complete text of statute appears in Appendix A (*infra* pp. 21 to 26).

sign, street car, placard, or on any other object or place of display, any advertisement of cigarettes, cigarette papers, cigars, chewing tobacco, or smoking tobacco, or any disguise or substitute of either, except that a dealer in cigarettes, cigarette papers, tobacco, or cigars or their substitutes, may have a sign on the front of his place of business stating that he is a dealer in such articles, provided that nothing herein shall be construed to prohibit the advertising of cigarettes, cigarette papers, chewing tobacco, smoking tobacco, or any disguise or substitute of either in any newspaper, magazine or periodical printed or circulating in the State of Utah."

STATEMENT OF FACTS.

Appellant, The Packer Corporation, is a corporation organized and existing under the laws of the State of Delaware and authorized to do business in the State of Utah, with its principal office in Cleveland, Ohio. (R., 24.) It is the owner of certain billboards in the State of Utah, upon which it displays posters advertising various products. (R., 25.)

Under the terms of a contract entered into at Cleveland, Ohio, (R., 24) between appellant and the advertising agency of Foster & Kleiser, of San Francisco, California, appellant, on April 22, 1931, displayed posters upon a certain billboard owned and operated by it in Salt Lake City, Utah (R., 20) which posters contained an illustration of a horse and rider, a representation of a package of Chesterfield cigarettes, and the words "Good Taste Takes the Lead." (R., 19.) Said posters were prepared and shipped by The Liggett & Meyers Tobacco Company from the State of California to appellant in the State of Utah for display by appellant upon said billboard (R., 23), in accordance with the terms of said contract.

For such display appellant was arrested and charged with violation of said Section 2, and was convicted in the

Justices' Court of the City of Salt Lake, and again convicted on appeal to the District Court of Salt Lake County and sentenced to pay a fine of One Hundred Dollars.

At the trial of appellant in the District Court of Salt Lake County it demurred to the complaint upon the ground that Section 2 violated the Constitution of the United States in that among other things:

A. It violated the provisions of Article I, Section 10, by impairing the obligations of contracts.

B. It violated the provisions of Article I, Section 8, by unduly restraining interstate commerce.

C. It violated the provisions of the Fourteenth Amendment by depriving the appellant of property without due process of law, and denying the appellant the equal protection of the laws. (R., 12-13.)

Said demurrer was overruled and exception taken thereto, and upon trial appellant again urged by motion the grounds of the unconstitutionality of said Section 2 as hereinabove set forth. (R., 14.) Said motion was denied and exception thereto taken, and the appellant was convicted.

From such conviction appeal was taken to the Supreme Court of the State of Utah, in which court appellant again raised the unconstitutionality of Section 2 under the Constitution of the United States.

The Supreme Court of Utah affirmed the conviction in the District Court, with two Justices dissenting. In this decision the Supreme Court of Utah was controlled by the case of *State vs. The Packer Corporation*, ... Utah .., 297 Pac. 1013 (1931), which opinion on a similar state of facts sets forth the reasons controlling the Supreme Court of the State of Utah in the instant case.

SPECIFICATIONS OF ERROR.

The ultimate error assigned by the appellant is that the Supreme Court of Utah erred in holding as a matter of law that Section 2, as applied to this appellant, did not violate the Constitution of the United States. Whether or not the Supreme Court of Utah did so err is the sole issue in this case.

Detailed specifications of error are set forth in the assignments of error (R., 30-32), of which appellant urges in this Court only the following:

A. The Supreme Court of Utah erred in holding as a matter of law that Section 2 did not violate the Fourteenth Amendment to the Constitution of the United States, and

B. The Supreme Court of Utah erred in holding as a matter of law that Section 2 did not violate Article I, Section 8 of the Constitution of the United States.

SUMMARY OF ARGUMENT.

Summarizing, appellant respectfully urges that Section 2 of the Utah Statute aforesaid violates the Constitution of the United States in the following respects:

A. Section 2 constitutes an improper exercise of police power, and therefore violates the Fourteenth Amendment to the Constitution of the United States—

1. By unreasonably discriminating between the display by appellant of tobacco advertisements upon billboards and the display of such advertisements by others similarly situated, in newspapers, magazines or periodicals, thus denying to the appellant the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

2. By depriving appellant without due process of law of its property in a contract duly entered into by

appellant, through the enactment of such an arbitrary and unreasonable statute as Section 2, in violation of the Fourteenth Amendment to the Constitution of the United States.

B. Section 2 places an unreasonable restraint upon commerce among the several States, in violation of Article I, Section 8 of the Constitution of the United States.

ARGUMENT.

I. SECTION 2 OF THE UTAH STATUTE UNDER WHICH THE APPELLANT WAS CONVICTED VIOLATES THE CONSTITUTION OF THE UNITED STATES.

A. Section 2 of the Utah Statute constitutes an improper exercise of the police power of the State of Utah and therefore violates the Fourteenth Amendment to the Constitution of the United States.

History of Utah Statute. In 1921 the Utah Legislature passed an Act making it unlawful to sell or advertise cigarettes or cigarette papers in the State, for proprietors to permit minors to frequent their places of business while using tobacco, and forbidding any person to smoke in certain enclosed public places. This Act met with such public disapproval that the next Legislature, Laws of Utah, 1923, Chapter 52, repealed it. The 1923 Act required the obtaining of a permit and paying of an annual license to sell cigarettes and imposed a tax upon cigarettes.

Thus, upon obtaining a permit and paying the annual license fee and the tax the sale of cigarettes and cigarette papers was made lawful, and the business in these articles can ... ore now be carried on as any other lawful business.

The 1923 Act provided against the sale of tobacco to minors, thus reinstating a law which had been in force in

Utah for many years. The 1923 Act further provided against minors smoking in the establishments of tobacco dealers, thus re-enacting a part of the 1921 Act. However, in all other places a minor was and is at liberty to chew and smoke tobacco in all its forms without restrictions and under the same conditions that an adult is permitted to use tobacco.

Section 2 of the 1923 Act prohibiting all advertising of cigarettes was considered by the Utah Supreme Court in *State vs. Salt Lake Tribune Publishing Company,* 68 Utah 187, 249 Pac. 474, (1926) and so far as it applied to the printing of cigarette advertisements in newspapers circulating in interstate commerce was held unconstitutional as violating Article I, Section 8 of the Constitution of the United States. The Court, however, found it unnecessary to express an opinion as to the validity of the Act in other respects.

Thereafter the Legislature, Laws of Utah, 1929, Chapter 92, amended Section 2 of the Laws of 1923 to make it applicable to the advertising of all forms of tobacco but in order to avoid the effect of the *Salt Lake Publishing case, supra,* provided that the Section should not apply to tobacco advertisements appearing in periodicals. The appellant respectfully submits that in its struggle to avoid the effects of the *Salt Lake Tribune Publishing Company case* the State of Utah enacted legislation which is repugnant to the Constitution of the United States.

1. To make illegal the display of tobacco advertisements by the appellant upon billboards and to exempt the display of tobacco advertisements in periodicals by others similarly situated is to deny the appellant the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

It is clear from the provisions of Section 2 that the advertising of tobacco on billboards, placards or other places

of display constitutes a misdemeanor, while the advertising of tobacco in newspapers or other periodicals is not forbidden. Certainly this is a discrimination in favor of one class of advertising against another class. Moreover, it is a discrimination which upon its face is of an unusual character. This Court, speaking through Mr. Justice Sutherland, in *Louisville Gas Company vs. Coleman*, 277 U. S. 32, 37 (1928) said:

> "Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision."

If the discrimination of Section 2 is not obnoxious to the Constitution, it must be justified upon the ground that it was made in the exercise of police power in order to protect the public morals, the public health and/or the public safety. In *Connolly vs. Union Sewer Pipe Company*, 184 U. S. 540, 558 (1902), this Court said:

> "* * * The State has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health and the public safety, but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void."

Again this Court, speaking through Mr. Justice Van Devanter, in *Power Manufacturing Company vs. Saunders*, 274 U. S. 490, 493 (1927) has said:

> "The clause in the Fourteenth Amendment forbidding a State to deny to any person within its jurisdiction the equal protection of the laws is a pledge of the protection of equal laws, [citing cases] and extends as well to corporate as to natural persons, [citing cases]. It does not prevent a State from adjusting its legislation to differences in situation or forbid classification in that connection; but it does require

that the classification be not arbitrary but based on a real and substantial difference having a reasonable relation to the subject of the particular legislation."

This Court has recently decided a case directly in point; *Smith vs. Cahoon*, 283 U. S. 553 (1931). Appellant in that case, a private carrier for hire, was arrested in Florida for driving upon the highways of the State without having obtained a certificate of public convenience and necessity and without having paid a tax required by the statute of Florida, which provided for the regulation of "automobile transportation companies." The statute in defining an "automobile transportation company" excepted, among others, corporations or persons exclusively engaged in transporting farm products from the point of production to the assembly or shipping-point en route to a primary market. At the preliminary hearing the appellant challenged the validity of the statute as applied to him, on the ground that it was repugnant to the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States. The appellant was held for trial, but upon a return to a writ of *habeas corpus* the Circuit Court of the county decided that the statute as applied to the appellant was unconstitutional. This judgment was reversed by the Supreme Court of Florida, which upheld the statute. The case then came to this Court on appeal, where the judgment was reversed. A unanimous Court, speaking through the Chief Justice, said at page 566:

"The principle that the State has a broad discretion in classification in the exercise of its power of regulation is constantly recognized by the decisions of this Court. [Citing cases] But the constitutional guaranty of equal protection of the laws is interposed against discriminations that are entirely arbitrary. In determining what is within the range of discretion and what is arbitrary, regard must be had to the particu-

lar subject of the State's action. In the present instance, the regulation as to the giving of a bond or insurance policy to protect the public generally, in order to be sustained, must be deemed to relate to the public safety. This is a matter of grave concern as the highways become increasingly crowded with motor vehicles, and we entertain no doubt of the power of the State to insist upon suitable protection for the public against injuries through the operations on its highways of carriers for hire, whether they are common carriers or private carriers. *But in establishing such a regulation, there does not appear to be the slightest justification for making a distinction between those who carry for hire farm products, or milk or butter, or fish or oysters, and those who carry for hire bread or sugar, or tea or coffee, or groceries in general, or other useful commodities.* So far as the statute was designed to safeguard the public with respect to the use of the highways, we think that the discrimination it makes between the private carriers which are relieved of the necessity of obtaining certificates and giving security, and a carrier such as the appellant, was wholly arbitrary and constituted a violation of the appellant's constitutional right. 'Such a classification is not based on anything having relation to the purpose for which it is made.' *Air-way Corp. v. Day,* 266 U. S. 71, 85 [citing cases]." (Italics ours.)

If, as was held in the *Cahoon case, supra,* there is no justification for making a distinction between the hauling of farm products and the hauling of groceries, then there can be no justification for making a distinction between the advertising of tobacco by displays upon billboards and the advertising of tobacco by displays in periodicals. There is even less justification for distinguishing, as does Section 2, between display advertising by tobacco dealers on the fronts of their places of business and display advertising by non-dealers everywhere. Under the doctrine of the *Cahoon case, supra,* Section 2 is clearly discrimina-

tory and the classification there made "is not based on anything having relation to the purpose for which it is made." *Air-Way Corporation vs. Day*, 266 U. S. 71, 85 (1924).

As this Court has said in *Connolly vs. Union Sewer Pipe Company*, 184 U. S. 540, 563 (1902):

> "In prescribing regulations for the conduct of trade, it cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another and favored class engaged in the same domestic trade to do the same things with impunity. It is one thing to exert the power of taxation so as to meet the expenses of government, and at the same time, indirectly, to build up or protect particular interests or industries. It is quite a different thing for the State, under its general police power, to enter the domain of trade or commerce, and discriminate against some by declaring that particular classes within its jurisdiction shall be exempt from the operation of a general statute making it criminal to do certain things connected with domestic trade or commerce. Such a statute is not a legitimate exertion of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the laws to those against whom it discriminates."

The State of Utah, in Section 2 of the statute in question, has done what this Court in the *Connolly case* said could not be done without violating rights secured by the constitution of the United States. It has entered the domain of advertising and discriminated against those engaged in display advertising by exempting those engaged in periodical advertising from the regulation of the statute. The statute in effect declares that the display of an advertisement of smoking materials upon a billboard is criminal, while the display of *the same advertisement* in a magazine is not criminal.

A state, in the exercise of its police power, can undoubtedly classify the subjects of regulation; but such classification must be based upon some reasonable ground —some difference which bears a just and proper relation to the attempted classification—and not a mere arbitrary selection. *Truax vs. Corrigan,* 257 U. S. 312, 332 (1921); *Hayes vs. Missouri,* 120 U. S. 68, 71 (1887); *Gulf, Colorado & Santa Fe Railway Company vs. Ellis,* 165 U. S. 150, 155 (1897); *Cotting vs. Kansas City Stock Yards Company,* 183 U. S. 79, 111 (1901).

Or in the words of Mr. Justice Straup, dissenting in the earlier Utah case construing Section 2 (297 Pac. 1013, 1022):

> "We thus are brought back to the proposition, and to the real question in hand, as to whether it was competent for the Legislature in the exercise of the police power, to curtail or prevent advertisements of a commodity of a lawful business, especially to forbid advertisements by a particular method not itself obnoxious or inimical to public morals or general welfare, and at the same time permit *ad libitum* all sorts of alluring and attractive advertisements of the same article or commodity by various other methods."

No justifiable basis for classification here exists. The sale of tobacco is not illegal in Utah, nor is it considered inimical to the public health or morals. There is nothing detrimental to public health or morals in billboard advertising, because every product except tobacco may be legally advertised upon billboards. Yet the Utah Legislature has singled out the billboard advertising of tobacco and attempted to make it illegal. It is to protect the citizens of the States from such capricious acts on the part of the State law-making bodies that the Fourteenth Amendment was added to the Constitution of the United States.

In a vain effort to find some reasonable basis upon which to support the discrimination against billboard ad-

vertising the Utah Supreme Court in the majority opinion of the earlier case sought to read into the Statute an intent to keep temptation from minors by striking at "a most effective and insidious method of inducement habitually used to lure the youth into the use of these products by prohibiting the advertising of cigarettes and tobacco on billboards, placards, and in street cars," (297 Pac. 1013, 1018). Even though this language is forceful, it is not convincing and fails to indicate any reasonable basis why one "insidious method of inducement" should be prohibited and the other methods with like effects and results allowed to flourish. If closely analyzed the language of the majority opinion in that case (297 Pac. 1013) simply states a conclusion—that "Billboards, street car signs, and placards and such are in a class by themselves" (297 Pac. 1013, 1019)—without suggesting reasons to support this conclusion.

The classification of Section 2 bears no reasonable relation to the protection of public health and/or public morals for which purposes it must be deemed the statute was enacted. Even assuming *arguendo* that the advertising of tobacco is inimical, there is no harmful element in display advertising which is not also inherent in periodical advertising. There is no real difference between display and periodical advertising. Very frequently exactly the same illustrations and wording are used in both. Each class of advertising is equally subject to examination by minors and adults. Display advertising is simply one of the many mediums of which radio, hand-bills, and direct mail are others. If there is any distinction between one class of advertising and another from the standpoint of protecting public health or morals, it must be on the basis that one form makes a deeper impression upon the public than others. That there is no such distinction in the effectiveness so far as making an impression upon the public is concerned is evidenced by the fact that national adver-

tisers usually use all forms. There is, therefore, no reasonable distinction between the two classes of advertising and to legislate against the form used by the appellant without legislating against the forms used by others similarly situated denies to the appellant equal protection of the laws.

The appellant will not burden this Court with a further citation from the many cases which establish the doctrine that in the exercise of its police power a State can make only a reasonable classification without violating the Fourteenth Amendment to the Constitution of the United States.

The appellant will conclude its application of this doctrine to Section 2 by respectfully referring this Court to the dissenting opinion of Mr. Justice Straup, of the Utah Supreme Court, in the case upon which the Utah Supreme Court relied entirely in deciding this case, 297 Pac. 1013, 1020. In this dissenting opinion there appears a very clear statement of the manner in which Section 2 is discriminatory. The concluding paragraph of this dissenting opinion, found at 297 Pac. page 1029, is as follows:

> "Thus, since tobacco has not been outlawed, and to engage in buying and selling it is a lawful business, and since advertisement thereof is a necessary incident thereto, an act, preventing advertisement of tobacco by a particular and lawful method or medium, not itself obnoxious or harmful, while permitting advertisements of all other articles of merchandise by the same method, and permitting tobacco in all its forms to be advertised by all other methods, except by billboards, etc., is an unreasonable and arbitrary exercise of the police power, creates an unwarranted discrimination, abridges the right to contract concerning a lawful business and the right to acquire, possess, and enjoy property, in effect amounts to a deprivation of property without due process of law, and is a denial of the equal protection of the law and of privileges and immunities of citizens safeguarded and protected by constitutional provisions."

2. To make it illegal for the appellant to carry out the contract under which the advertisement in question was displayed, by a statute so unreasonable and arbitrary as Section 2, is to deprive the appellant of property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

The appellant had a contract under the terms of which it posted the particular advertisement for the displaying of which it was convicted under Section 2. Under the terms of this contract the appellant was to display other similar advertisements in the State of Utah at other times and places, for which it was to receive payments. The right of the appellant to make such a contract was a property right.

This Court has repeatedly held that freedom in the making of contracts is a property right. For example, in *Prudential Insurance Company vs. Cheek,* 259 U. S. 530 (1922), it was said at page 536:

> "That freedom in the making of contracts of personal employment, by which labor and other services are exchanged for money or other forms of property, is an elementary part of the rights of personal liberty and private property, not to be struck down directly or arbitrarily interfered with, consistently with the due process of law guaranteed by the Fourteenth Amendment, we are not disposed to question. This court has affirmed the principle in recent cases. *Adair v. United States,* 208 U. S. 161, 174; *Coppage v. Kansas,* 236 U. S. 1, 14."

While the freedom of the appellant to make contracts may be abridged by the State under the exercise of its police power, that restraint must be exercised in protecting some public interest, and the restraints upon the appellant's freedom of contract must be reasonable and cannot be arbitrary without being obnoxious to the Constitu-

tion of the United States. Speaking with respect to an act of the State of Kansas, this Court, in *Wolff Company vs. Industrial Relations Court of Kansas,* 262 U. S. 522 (1923), said at page 534:

> "These qualifications do not change the essence of the act. It curtails the right of the employer on the one hand, and of the employee on the other, to contract about his affairs. This is part of the liberty of the individual protected by the guaranty of the due process clause of the Fourteenth Amendment. *Meyer v. Nebraska, ante,* 390. While there is no such thing as absolute freedom of contract and it is subject to a variety of restraints, they must not be arbitrary or unreasonable. Freedom is the general rule, and restraint the exception. The legislative authority to abridge can be justified only by exceptional circumstances. *Adkins v. Children's Hospital,* 261 U. S. 525."

Thus, while the appellant's freedom of contract may be restrained by the State of Utah in the exercise of its police power, such a restraint must have a reasonable relation to the purpose for which the statute was enacted, and the restraint must not be arbitrary. As this Court, speaking through Mr. Justice McReynolds, said in *Liberty Warehouse Company vs. Burley Tobacco Association,* 276 U. S. 71, 97 (1928):

> "The liberty of contract guaranteed by the Constitution is freedom from arbitrary restraint—not immunity from reasonable regulation to safeguard the public interest. The question is whether the restrictions of the statute have reasonable relation to a proper purpose. *Miller v. Wilson,* 236 U. S. 373, 380."

See also *Fairmount Creamery Co. vs. Minnesota,* 274 U. S. 1 (1927), where this Court held unconstitutional as violating the due process clause of the Fourteenth Amendment a Minnesota statute punishing anyone engaged in the business of buying dairy products, who discriminated be-

tween the different localities of the State by buying such commodities in one locality at a higher price than in another locality, allowance being made for difference in cost of transportation; and *Liggett Co. vs. Baldridge*, 278 U. S. 105 (1928), where this Court held unconstitutional a statute forbidding corporations from owning drug stores in addition to those owned at the time of the enactment unless all of the stockholders were licensed pharmacists, on the ground that it violated the due process clause of the Fourteenth Amendment, because mere stock ownership in a corporation owning a drug store could have no substantial relation to public health.

Under the doctrine of these cases Section 2 of the Utah statute in question violates the due process clause of the Fourteenth Amendment to the Constitution of the United States unless it is a restraint upon the appellant's right to freedom of contract which bears a reasonable relation to the purpose for which the Statute was enacted. It must be deemed that Section 2 was enacted for the purpose of protecting the health and/or morals of the people of the State of Utah. If the purpose of the statute is to protect the health and/or morals of the children of Utah by reducing their desire to purchase tobacco, it seems entirely unreasonable to prohibit billboard advertising of tobacco to everyone simply because some children may see the advertising and be made to desire the use of tobacco. Certainly by direct action against those who sell tobacco to minors the law may be enforced, and it is unreasonable to prohibit all display advertising simply because it may have some slight effect upon the number of children who ask tobacco dealers to violate the law by selling them tobacco.

Section 2 is both arbitrary and unreasonable in the way it deprives appellant of its property and is, therefore, obnoxious to the due process clause of the Fourteenth Amendment to the Constitution of the United States.

B. Section 2 of the Utah Statute places an unreasonable restraint upon commerce among the several States and therefore violates Article I, Section 8 of the Constitution of the United States.

The Record (R. 23) indicates that the advertisements for the display of which appellant was convicted were shipped from the State of California into the State of Utah and then placed by the appellant upon its billboards. The advertisements which were sent into the State of Utah from a foreign state for the purpose of being posted upon the billboards in the State of Utah were articles in interstate commerce, and Section 2 prohibiting the display of these advertisements was an undue restraint of commerce among the several States and therefore violated Article I, Section 8 of the Constitution of the United States.

The case of *Ramsay Company vs. Bill Posters Association,* 260 U. S. 501 (1923), is a case in point. That case involved actions for damages under the Sherman Act. The trial court dismissed the complaints upon demurrer and the Circuit Court of Appeals affirmed this action. This Court reversed the Circuit Court of Appeals. The plaintiffs were solicitors of advertising. They prepared, purchased and sold posters and caused them to be displayed by local operators in many cities throughout the United States. They contracted with their customers and received pay for the entire service of preparing, designing, purchasing and posting the advertisements. It was claimed that many bill posters throughout the United States combined to monopolize the business and control the commerce in posters within fixed limits. In order for this Court to hold that the defendants violated the Sherman Act it became necessary to decide whether the business of the solicitors sending advertisements to their customers to be posted on billboards in various sections of the country con-

stituted interstate commerce. This Court, speaking through Mr. Justice McReynolds, said at page 511:

> "The court below held: 'The business of the solicitors is to send their customers' advertisements to be posted on billboards in various towns and cities throughout the country. Assuming that this business is, as between them and their customers, interstate commerce, we are clear that, after the posters have arrived at destination, *the posting of them by the bill poster is a purely local service, not directly affecting, but merely incidental to, interstate commerce.* We think this follows from the decision of the Supreme Court in *Hopkins v. United States*, 171 U. S. 578.'
>
> *We cannot accept this view.* The alleged combination is nation-wide; members of the Association are bound by agreement to pursue a certain course of business, designed and probably adequate materially to interfere with the free flow of commerce among the States and with Canada. As a direct result of the defendants' joint acts plaintiffs' interstate and foreign business has been greatly limited or destroyed. *Hopkins v. United States* is not applicable." (Italics ours)

Thus, in the *Ramsey case* this Court held that the sending from one state to another of advertisements to be displayed upon billboards was interstate commerce. Section 2 prohibits the display of these advertisements which are articles of interstate commerce, and therefore constitutes an unreasonable restraint upon interstate commerce and is obnoxious to the Constitution of the United States.

The party contracting with the appellant for the display of the advertisements to be shipped in interstate commerce intended that the particular advertisement should be shipped to the appellant and did not contemplate that the movement of the advertisement should cease until it was displayed upon the appellant's billboards throughout the State of Utah. The interstate character of the ship-

ment, therefore, continued until the advertisement had been displayed upon the billboards as contemplated by the parties. That this interstate character continued until that point is shown by the language of this Court, speaking through Mr. Justice Sutherland, in *Binderup vs. Pathe Exchange*, 263 U. S. 291, 309 (1923), where it was said:

> "Does the circumstance that in the course of the process the commodity is consigned to a local agency of the distributors, to be by that agency held until delivery to the lessee in the same State, put an end to the interstate character of the transaction and transform it into one purely intrastate? We think not. The intermediate delivery to the agency did not end and was not intended to end the movement of the commodity. It was merely halted as a convenient step in the process of getting it to its final destination. The general rule is that where transportation has acquired an interstate character 'it continues at least until the load reaches the point where the parties originally intended that the movement should finally end.' *Illinois Central R. R. Co. v. Louisiana R. R. Comm.*, 236 U. S. 157, 163."

See also *Illinois Central Railroad vs. Louisiana Railroad Commission*, 236 U. S. 157, 163 (1915), where this Court said:

> "When freight actually starts in the course of transportation from one State to another it becomes a part of interstate commerce. The essential nature of the movement and not the form of the bill of lading determines the character of the commerce involved. And generally when this interstate character has been acquired it continues at least until the load reaches the point where the parties originally intended that the movement should finally end."

See also *Western Union Telegraph Company vs. Foster*, 247 U. S. 105, 113 (1918), and *Western Oil Refining Company vs. Lipscomb*, 244 U. S. 346, 349 (1916).

It thus appears from these cases that the interstate character of the shipment of the lithographs in question continued until these advertisements had been displayed upon the billboards in the State of Utah. With such interstate shipment the State of Utah could not by such unreasonable legislation interfere without such legislation being obnoxious to Article I, Section 8 of the Constitution of the United States.

CONCLUSION.

In accordance with the foregoing, it is respectfully submitted that the decision of the Supreme Court of Utah should be reversed, and the case remanded with directions that the appellant be discharged.

Respectfully submitted,

GARDNER ABBOTT,
WILLIAM H. REEDER, JR.,
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Cleveland, Ohio,
December 19, 1931.

APPENDIX A.

The following is the complete text of Chapter 145, Laws of Utah 1921, as amended by Chapter 52, Laws of Utah 1923, as amended by Chapter 68, Laws of Utah, 1925, as amended by Chapter 92, Laws of Utah 1929, as amended by Chapter 5, Laws of Utah 1930:

Section 1. *Unlawful to sell without license—State treasurer to grant—time limit—to whom may be granted—license to show—power to revoke—who must comply—fees and conditions—stamps—unlawful when—penalty.* It shall be unlawful for any person to barter, sell or offer for sale, cigarettes or cigarette papers in this State, without first having obtained a license therefor, which said license may be granted and issued by the State treasurer and shall be in force and effect for one year from and after the date of issuance, unless sooner revoked. It shall be granted only to a person owning or operating the place from which such sales are to be made, which shall be within the territorial limits of the State of Utah. Each license shall be numbered and shall show the residence and place of business of the licensee, and shall not be transferable. The State treasurer shall, on reasonable notice and after hearing, revoke the license of any person violating any provision of this Act, and no license can be issued to such person within a period of two years thereafter. Wholesalers, jobbers and distributors selling direct to consumers must comply with the provisions of this Act.

(a) No license shall be issued until the applicant shall have paid to the State treasurer an annual license fee of $10.00 per year or fraction thereof. All such license fees shall be credited to the general fund of the State.

(b) No license shall be issued until the applicant therefor shall have filed with the State treasurer a bond, to be approved by him, payable to the State of Utah for the benefit of all parties interested, in the amount of $500.00, and conditional upon the faithful observance of all the provisions of this Act, and for the payment of all damages that may result from the unlawful sale of ciga-

rettes or cigarette papers. Said bond shall be executed by a surety company authorized to do business in this State.

(c) There is hereby imposed, and there shall be collected by and paid to the State treasurer, upon the sale of all cigarettes and cigarette papers, or wrappers and tubes sold in this State to consumers, the following taxes:

Class A. On cigarettes weighing not more than three pounds per thousand, one mill on each such cigarette;

Class B. On cigarettes weighing more than three pounds per thousand, two mills on each such cigarette.

Class C. On cigarette papers or wrappers *on* [sic] any papers made or prepared for the purpose of making cigarettes, made up in packages, books or sets; on each such package, book or set containing not more than fifty papers, one-half cent; containing more than fifty papers but not more than one hundred papers, one cent; containing more than one hundred papers, one-half cent for each fifty papers or fractional part thereof.

Class D. On tubes, one cent for each fifty paper tubes or fractional part thereof.

(d) All cigarettes sold in this State under the provisions of this Act shall be put in packages containing 5, 8, 10, 12, 15, 16, 20, 24, 40, 50, 80 or 100 cigarettes each, and whenever a carton of cigarettes or a box containing packages of cigarette papers is broken open, such carton of cigarettes or packages of cigarette papers shall be construed to be open stock, and all open stock of cigarettes or cigarette papers and each package, book or set of papers or of tubes shall have securely affixed thereto a suitable stamp denoting the tax thereon. Said stamp shall be properly cancelled under such regulations as the State treasurer shall prescribe, and it shall be unlawful for any dealer to fail to affix to each package of cigarettes or cigarette papers the stamps denoting the tax thereon as herein provided, or to have in his possession any open stock of cigarettes or cigarette papers without having affixed thereto revenue stamps as herein provided.

When a full carton of cigarettes or a box of cigarette papers is sold the seal must be broken open and the re-

quired amount of revenue stamps affixed to each separate package of cigarettes or cigarette papers therein.

(e) Every dealer in cigarettes or cigarette papers shall keep all surplus and open stock of cigarettes and cigarette papers in such form as may be prescribed by the State treasurer, and shall keep a record of all his purchases of cigarettes and cigarette papers. Such records shall include invoices or bills of all such purchases and shall at all times during business hours be subject to inspection by the State treasurer or by any person duly authorized by him.

(f) Any person violating any provision of this Act other than sub-sections g and k shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than $100.00 nor more than $299.00 or by imprisonment not exceeding six months, or by both such fine and imprisonment. All fines collected to be credited 50 per cent to the general fund of the city, town or county collecting the same; and 50 per cent to be remitted to the State treasurer. Reports shall be made to the State treasurer of all fines so collected, on the last day of such month.

(g) It shall be unlawful for any person with the intent to defraud the State to make, alter, forge or counterfeit any license or stamp provided for in this Act or to have in possession any forged, counterfeited, spurious or altered license or stamp, knowing the same to be forged, counterfeited, spurious or altered, and whoever is found guilty of any violation of this sub-section shall be fined not more than $1,000 or be imprisoned in the State prison not more than three years or by both such fine and imprisonment.

(h) The State auditor shall prepare and have suitable stamps for use on each kind of package described herein. Upon requisition from the State treasurer the State auditor shall deliver to his order the stamps designated in such requisition and shall charge the State treasurer with the stamps thus delivered, and shall keep an accurate record of all stamps coming into and leaving his hands. The State treasurer shall sell the stamps herein provided for only to dealers holding licenses issued as provided in this Act and the moneys received from the sale

of such stamps shall be turned into the general fund of the State. The State treasurer shall redeem and make repayment for any unused stamps on written request made by such dealer and pay for same out of any funds derived from the provisions of this Act. It shall be unlawful for a dealer to sell or dispose of such stamps to another dealer or to any person whomsoever, except whenever a person owns or operates more than one place of sale stamps may be distributed to the various places of sale by the main office, but each place of sale must have a separate license and cancellation stamp, and passenger trains operating within this State may stock their dining or buffet cars with cigarettes that have been stamped and cancelled with the cancellation number at division headquarters.

(i) The State treasurer in the enforcement of this Act may call to his aid the attorney-general, any county or district attorney or any peace officer. He is authorized to employ such clerks and additional help as may be needed to carry out the provisions of this Act.

(j) Licenses in force at the time this Act takes effect shall continue in force until they expire by their terms or are lawfully revoked.

(k) Any person who shall furnish to any minor by gift, sale or otherwise any cigarette or cigarette paper or wrapper, or any paper made or prepared for the purpose of making cigarettes, or any tobacco of any kind whatsoever shall be guilty of a misdemeanor, and shall be punished by fine of not less than $25 nor more than $299 or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment.

(l) Any person maintaining a place where cigarettes or cigarette papers or tobacco are sold or kept with intent to sell in violation of the provisions of this Act shall be deemed guilty of keeping and maintaining a nuisance, and the building or place so used for the sale or keeping for sale of cigarettes or cigarette papers or wrappers, or tobacco in violation of the provisions of this Act shall be deemed to be a nuisance, and such persons may be enjoined from maintaining such nuisance and such building or place may be abated as a nuisance, the procedure for

actions to enjoin and abate such nuisance, or for contempt in violating an order of injunction, shall be so far as applicable the same as that now provided by the laws of this State for enjoining and abating intoxicating liquor nuisances.

Section 2. *Unlawful to Display Advertising—Where.* It shall be a misdemeanor for any person, company, or corporation, to display on any bill board, street car sign, street car, placard, or on any other object or place of display, any advertisement of cigarettes, cigarette papers, cigars, chewing tobacco, or smoking tobacco, or any disguise or substitute of either, except that a dealer in cigarettes, cigarette papers, tobacco, or cigars or their substitutes, may have a sign on the front of his place of business stating that he is a dealer in such articles, provided that nothing herein shall be construed to prohibit the advertising of cigarettes, cigarette papers, chewing tobacco, smoking tobacco, or any disguise or substitute of either in any newspaper, magazine or periodical printed or circulating in the State of Utah.

Section 3. *Use of Tobacco, etc., by Minors Unlawful.* It shall be a misdemeanor for the proprietor of any place of business to knowingly permit minors under twenty-one years of age to frequent such place of business while in the act of using tobacco in any form. The term "place of business" as here used shall apply to any and all such places as shops, stores, factories, public garages, offices, theaters, recreation and dance halls, pool room, cafes, cafeterias, cabarets, restaurants, hotels, lodging houses, street cars, inter-urban and railway passenger coaches and waiting rooms.

Section 4. *Smoking Tobacco, etc., in Enclosed Place, Except in Smoking Rooms Forbidden—Smoking Signs.* It shall be a misdemeanor for any person to smoke cigars, cigarettes or tobacco in any form in any enclosed public place within the State of Utah, except in extra rooms, compartments or coaches specially provided for smoking purposes. The term "enclosed public place" as here used shall be construed to mean the dining rooms in hotels, restaurants, cafes and cafeterias; theaters, passenger ele-

vators, street cars, inter-urban and railway passenger coaches, motor and other passenger vehicles employed as common carriers, railway station waiting rooms, state, county and city buildings, excepting that the owner or proprietor of any hotel dining room, restaurant, cafe or cafeteria may designate the same as a public smoking room by a conspicuous sign at or near the entrance; provided, further, that in any State, county or city building, any public officer who has a private office separate and apart from his public office, may if he so desires, designate such private office as a place where smoking may be permitted, and so long as such private office is so designated smoking therein shall not be considered in violation of this Act.

Section 5. *"Unconstitutional" Reservation.* If any section, sub-section, clause, phrase or word of this Act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this Act.

Section 6. This Act shall take effect and be in force ninety days from the date of its passage.

In the Supreme Court of the United States

OCTOBER TERM, 1931.

No. 357

THE PACKER CORPORATION,
Appellant,

vs.

THE STATE OF UTAH.

APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH.

REPLY BRIEF OF APPELLANT.

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Cleveland, Ohio,
January 14, 1932.

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APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH.

REPLY BRIEF OF APPELLANT.

The appellee at page 3 of its brief cites Section 8443 Compiled Laws of Utah 1917, by which a minor having, *inter alia,* cigars, cigarettes or tobacco in his possession is deemed guilty of a misdemeanor.

Section 8443 does not appear in the Record, nor was it argued on behalf of the State of Utah in the District Court of Salt Lake County at the trial of appellant, nor was it argued to the Supreme Court of Utah. The majority opinion of the Supreme Court of Utah made no mention of this statute, nor did that court comment upon or refer to that statute in the case of *State v. The Packer Corporation,* 297 Pac. 1013, (1931) which is relied upon by both appellant and appellee.

Indeed, the dissenting opinion by Mr. Justice Straup in said case, set forth in full in appellee's brief, pages 46-72, and concurred in by Mr. Justice Hanson, states specifically:

> "However, at and in all other places a minor was and is at liberty to chew and smoke tobacco in all its

> forms without restriction and under the same conditions that an adult is permitted to use tobacco." (see page 46 of appellee's brief.)

This positive statement of Mr. Justice Straup is adopted in full by the appellant at page 6 of its brief.

Appellant recognizes, however, that this Court may take judicial notice of Section 8443. *New York Indians v. U. S.*, 170 U. S. 1, 32 (1897).

It would seem that the statement of Mr. Justice Straup is not fully justified unless Section 8443 is presumed by the Supreme Court of Utah to have been repealed by implication by some later law covering the same subject, such as Section 3 of Chapter 145 of the Laws of Utah 1921, as amended (see page 25, appellant's brief). Whether there has been repeal by implication appellant does not assert. It is also possible that Section 8443, being included among the miscellaneous and little-used statutes of Utah, has never been enforced and hence has been overlooked.

In any event, whether or not minors are permitted the use of tobacco under certain restrictions and in certain places, there is no question but that the sale and use of tobacco in all forms is entirely legal in the State of Utah with respect to all classes except minors.

The argument of appellee is entirely to the effect that the classification of billboards, street car signs and placards is justified and reasonable because of the "alluring" quality of such advertisements to minors and because in the opinion of appellee the strength of character of a minor is not sufficient to withstand such allurement on a billboard, although the same advertisements, with all their color and allurement, appearing in a periodical are not alluring to the same extent and hence are not prohibited. Certainly magazines and periodicals, which as a matter of common knowledge are retained in the home, open to inspection by

all members of the family, including minors, would seem to present an equally constant attraction. Certainly there is no more necessity of a minor glancing at a billboard than at a magazine or newspaper. No facts of any kind appear in the record suggesting any real distinction between billboard and periodical advertising. If we are to speak of matters of common knowledge, it would seem more probable that the attention of minors is more strongly directed toward magazines, periodicals and newspapers than toward billboards.

The advertisment of tobacco appearing in a periodical is legal, while the same advertisement in the same colors appearing on a billboard is illegal. Keeping in mind the evil which the appellee says the Utah Legislature sought to remedy, there can be no reasonable classification between billboard and periodical advertising. The youth of Utah is just as apt to succumb to the "persuasion and inducement" of the tobacco advertisement appearing in the magazine lying upon the living-room table of the home as he is to be persuaded and induced even by the rows of billboards which the appellee mentions in its brief.

DISCUSSION OF STATE BOARD OF TAX COMMISSIONERS v. JACKSON.

The appellee on page 19 of its brief cites the case of *State Board of Tax Commissioners v. Jackson*, 283 U. S. 527 (1931), as being in point to prove that the differences between magazine, newspaper and periodical advertising and placard, street car and billboard advertising are sufficiently great so that the Utah Legislature may distinguish between them and prohibit the former types while allowing the latter. The appellant submits that the *Jackson* case is not in point upon that proposition.

The *Jackson* case involved the constitutionality of a statute taxing chain stores at a different rate from inde-

pendently owned stores. At the outset it should be recognized that in the *Jackson* case this Court was not considering the statute there in question from the standpoint of a police measure, but as a tax measure. This Court, speaking through Mr. Justice Roberts, states:

> "In the court below appellants defended on the grounds that the statute was an exercise of the police power and was also a revenue measure which levied an ordinary occupation tax. They offered no evidence to sustain the first ground mentioned, and do not press it here. They now stand only upon the power of the legislature, in prescribing an occupation tax, to classify businesses, so long as its action is not unreasonable and arbitrary." (page 533)

The distinction between the *Jackson* case and this case lies in the differences in facts. This Court said:

> "The appellants produced evidence to prove that there are many points of difference between chain stores and independently owned units. These consist in quantity buying * * * buying for cash * * * warehousing of goods * * * a pricing and sales policy different from that of the individual store * * * a greater turn-over * * * standard forms of display * * * standardization of store management, sales policies and goods sold." (page 534)

In the instant case the record does not show a single fact to indicate any real distinction between magazine, newspaper and periodical advertising and placard, street car and billboard advertising.

The distinction, therefore, between the *Jackson* case and the instant case lies in the fact that in the *Jackson* case there was evidence in the trial court of real distinctions in fact between the classes defined by the legislature, whereas in the present case there were no facts presented in the trial court to show any distinction whatsoever between magazine, newspaper and periodical advertising and placard, street car and billboard advertising.

CONCLUSION.

There is no reasonable basis in the classification of advertising mediums attempted by the Legislature of Utah. One form is just as dangerous to the youth of Utah as the other, and to prohibit one form while at the same time allowing the use of another is to legislate in a manner contrary to the Constitution of the United States.

Respectfully submitted,

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Of Counsel:
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Cleveland, Ohio,
January 14, 1932.

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No. 357

THE PACKER CORPORATION,
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Appellant,

vs.

STATE OF UTAH,

Appellee.

BRIEF OF APPELLEE ON APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH.

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Appellee.

BRIEF OF APPELLEE ON APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH.

STATEMENT OF THE CASE.

The case of the State of Utah versus the Packer Corporation was before the Supreme Court of Utah upon two different occasions. The opinion of the Supreme Court of Utah in the second case is printed in the transcript of record, pages 3, 4, and 5. Near the bottom of page 5, transcript of record, Justice Folland makes the following statement:

> "The arguments presented are wholly concerned with the constitutionality of the act in question, and are substantially the same as were considered and passed on by this court in the case of State vs. Packer Corporation, ... Utah ....., 297 Pacific 1013. The decision in that case is therefore controlling."

As precisely the same questions were presented to the Supreme Court of Utah in the first case as were presented in the second from which decision this appeal is taken, and as the first opinion is made controlling in the second we have printed and set out herein, as Appendix No. 1, both the prevailing and dissenting opinions in the first case.

HISTORY OF LEGISLATION AND STATUTES INVOLVED.

A. STATE STATUTES INDICATE THAT THE STATE OF UTAH HAS, THROUGH THE EXERCISE OF ITS POLICE POWER ATTEMPTED TO STAMP OUT THE USE OF TOBACCO BY MINORS AND MINIMIZE ITS USE BY ADULTS.

In 1890, even before statehood, the legislature passed the following act, chapter 65, Laws of Utah, 1890 page 96,

> "Sec. 1. Be it enacted by the governor and legislative assembly of the territory of Utah: That any person who shall sell, give, or furnish any cigar, cigarette, or tobacco, in any form, opium, or any other narcotic in any form, to any minor under eighteen years of age in this territory, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than ten, nor more than one hundred dollars.
>
> "Sec. 2. The provisions of this act shall not apply to the use, sale, giving or furnishing of any narcotic upon the prescription of a physician."

This enactment remained until 1911 without amendment. In 1911 it was amended to read as follows:

> "Any person who shall sell, give, or furnish any cigar, cigarette, or tobacco in any form, or any opium or any narcotic in any form, to any person under twenty-one years of age, in this state, shall be guilty of a misdemeanor. The provisions of this section shall

not apply to the use, sale, giving or furnishing of any narcotic upon the prescription of any physician."

This section is at the present time in full force and effect in the State of Utah, and is known and designated as Section 8442, Compiled Laws of Utah, 1917.

As an additional measure designed to stamp out the use of tobacco by the youth of the state, the legislature in 1903 passed the following act, chapter 135, Laws of Utah, 1903, page 186:

"Any person under the age of eighteen years who shall buy, accept, or have in his possession any cigar, cigarette, or tobacco in any form, or any opium or any other narcotic in any form, shall be guilty of a misdemeanor."

This act was amended in 1911 and 1913, so that it now provides as follows:

"Any person under the age of twenty-one years who shall buy, accept, or have in his possession any intoxicating liquor, cigar, cigarette or tobacco in any form, or any opium or any other narcotic in any form, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not exceeding one hundred dollars."

The section last above quoted is at the present time in full force and effect in the State of Utah, and is known and designated as Section 8443, Compiled Laws of Utah, 1917.

In 1921 the legislature of the State of Utah, going a step further with its general policy to prevent the use of tobacco enacted chapter 145, Laws of Utah, 1921, which is as follows:

"Sec. 1. Cigarette and cigarette papers, sale, etc. unlawful—search and seizure. It shall be a mis-

demeanor for any person, company, or corporation to barter, sell, keep for sale, furnish or give away, any cigarettes or cigarette papers or any disguise or subterfuge of either of these, or to have any cigarettes or cigarette papers in or about any store or other place for barter, sale or free distribution. If, upon what seems to be reasonable evidence any person, company or corporation is suspected of having in his or its possession any cigarettes or cigarette papers intended to be offered for barter, sale or free distribution; then, upon the sworn complaint of any citizen of the state of Utah, specifying fully as to the alleged facts of the case, any officer authorized to make arrests may, upon the issuance of a search warrant or search warrants in the manner and form prescribed in Chapter 56, Title 120 of the Compiled Laws of Utah, 1917, code of criminal procedure (Secs. 9368-9389), search the premises of such person, company or corporation and may seize any cigarettes or cigarette papers so found. All such cigarettes or cigarette papers seized under the provisions of this Act shall be ordered destroyed by the judge of the court in which final conviction is had. The possession of such cigarette materials shall be considered prima facie evidence of a direct violation of this Act.

"Sec. 2. Advertisement, sign, etc., unlawful. It shall be a misdemeanor for any person, company or corporation to write, print, publish or circulate in any newspaper, magazine, periodical or circular written, printed or published within the state of Utah, any advertisement of cigarettes or cigarette papers, or any disguise or subterfuge of either of these. It shall also be unlawful for any person, company or corporation to post, exhibit or publish on any street-sign, placard or billboard; or in or on any package of merchandise, store-window, showcase, or any other place within the state of Utah, any advertisement for cigarettes or cigarette papers, or any disguise or subterfuge of either of these.

"Sec. 3. Use of tobacco, etc., by minors unlawful. It shall be a misdemeanor for the proprietor of

any place of business to knowingly permit minors under twenty-one years of age to frequent such place of business while in the act of using tobacco in any form. The term 'place of business' as here used shall apply to any and all such places as shops, stores, factories, public garages, offices, theatres, recreation and dance halls, pool rooms, cafes, cafeterias, cabarets, restaurants, hotels, lodging houses, street cars, inter-urban and railway passenger coaches and waiting rooms.

"Sec. 4. Tobacco smoking forbidden, where. It shall be a misdemeanor for any person to smoke cigars, cigarettes or tobacco in any enclosed public place within the state of Utah, except in extra rooms, compartments or coaches specially provided for smoking purposes. The term 'Enclosed public place' as here used shall be construed to mean the dining rooms in hotels, restaurants, cafes and cafeterias; theatres, passenger elevators, street cars, inter-urban and railway passenger coaches, motor or other passenger vehicles employed as common carriers, railway station waiting rooms, barber shops; state, county and city buildings.

"Sec. 5. 'Unconstitutional' reservation. If any section, subsection, clause, phrase or word of this Act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this Act.

"Sec. 6. This act shall take effect and be in force ninety days from the date of its passage."

Apparently because of the wide-spread use of cigarettes said chapter 145 of 1921 Laws of Utah was unpopular, and difficult if not impossible of enforcement. Therefore, the legislature in 1923 repealed all but one section (Sec. 3) of the 1921 law and enacted chapter 52, Laws of Utah, 1923, which we have set out at length hereinafter as Appendix No. 2.

As stated in the prevailing opinion of the State Court (Appendix No. 1), it is evident that the intent of the legis-

lature was a relaxation merely, and not an abandonment of its policy of restriction.

Section 1 of chapter 52, Laws of 1923, was again amended in 1925, chapter 68, Laws of Utah, 1925, which we have set out hereinafter at length as Appendix No. 3.

In 1926 the Salt Lake Tribune Publishing Company was convicted of violating the provisions of Section 2, chapter 145, Laws of Utah, 1921, as amended by chapter 52, Laws of Utah, 1923. The convicted company appealed to the Supreme Court of Utah, State vs. Salt Lake Tribune Publishing Company, 249 Pac. 474. The Supreme Court of Utah held that said Section 2 in so far as it made unlawful the advertising of tobacco in its various forms in newspapers, magazines and periodicals, was unconstitutional, as an undue interference with interstate commerce. The legislature not being willing to permit unlimited advertising amended Section 2 by enacting chapter 92, Laws of Utah, 1929, so that the said Section 2 now provides as follows:

> "It shall be a misdemeanor for an person, company, or corporation, to display on any billboard, street car sign, street car, placard, or on any other object or place of display, any advertisement of cigarettes, cigarette papers, cigars, chewing tobacco, or smoking tobacco, or any disguise or substitute of either, except that a dealer in cigarettes, cigarette papers, tobacco, or cigars or their substitutes, may have a sign on the front of his place of business stating that he is a dealer in such articles, provided that nothing herein shall be construed to prohibit the advertising of cigarettes, cigarette papers, chewing tobacco, smoking tobacco, or any disguise or substitute of either in any newspaper, magazine or periodical printed or circulating in the State of Utah."

This section is now in full force and effect in the State of Utah, and is the section appellant herein was convicted of having violated.

Section 1, of chapter 145, Laws of Utah, 1921, as amended by chapter 52, Laws of Utah, 1923, as amended by chapter 68, Laws of Utah, 1925, was again amended by chapter 5, special session laws of Utah, 1930. We have set out Section 1, as last amended herein as Appendix No. 4, which section is now in full force and effect in the State of Utah.

ARGUMENT.

THE STATUTES OF UTAH, OF WHICH THE PROHIBITION OF SAID ADVERTISING IS A FEATURE, IS A PROPER EXERCISE OF THE POLICE POWER OF THE STATE.

(A) THE FACT THAT CONSIDERABLE REVENUE IS RAISED DOES NOT DESTROY ITS CHARACTER AS A REGULATORY ACT PASSED IN THE EXERCISE OF THE POLICE POWER.

The act at present includes:

1. "The licensing of cigarette dealers by cities, towns, and counties upon the payment of a license fee.

2. "The imposition of a tax to be paid to the State upon all packages of cigarettes sold.

3. "Prohibiting the advertising of cigarettes and tobacco on billboards, placards and in street cars.

4. "Prohibiting the sale or furnishing of cigarettes or tobacco to minors under twenty-one years of age.

5. "Making it unlawful for proprietors of places of business to knowingly permit minors under twenty-

one years of age to frequent such places while using tobacco in any form.

6. "Vesting power in the licensing authority to revoke the license of any dealer for violation of the act, no new license to be granted such dealer within two years after such revocation.

7. "Regulations with respect to the tax feature looking to the collecting of the stamp tax."

The above features of the present law taken in connection with the history of the legislation on the subject above set out makes it appear that the purpose of the present act is to regulate and restrict the sale and use of cigarettes and tobacco. The fact that considerable revenue is raised and paid into the public treasury does not indicate that the act was passed as a revenue measure nor destroy its character as a regulatory act passed in the exercise of the police power. In the case of Phillips vs. City of Mobile, 208 U. S. 472, 28 S. Ct. 370, Justice Peckham, in speaking of an ordinance which imposed a license tax upon those engaged in selling beer in the city, said:

"We are of opinion that this section of the ordinance was clearly an exercise of the police power of the state, and as such authorized by the act of Congress. The fact that the city derives more or less revenue from the ordinance in question does not tend to prove that this section was not adopted in the exercise of the police power, even though it might also be an exercise of the power to tax. The police power is a very extensive one, and is frequently exercised where it also results in raising a revenue. * * *

"The sale of liquor is confessedly a subject of police regulation. Such sale may be absolutely prohibited, or the business may be controlled and regulated

by imposition of license taxes, by which those only who obtain licenses are permitted to engage in it. Taxation is frequently the very best and most practical means of regulating this kind of business. The higher the license, it is sometimes said, the better the regulation."

15 R. C. L., pp. 287 and 288, Section 42;
26 R. C. L., p. 17, Section 4.

Gundling vs. Chicago, 177 U. S. 183, 188, 44 L. Ed. 725, 20 Supreme Court Reports 633 contains this statement relative to an ordinance regulating the sale of cigarettes:

"The amount of the fee is fixed by the common council for the privilege of doing business, and the text of the ordinance and the amount of the fee named therein would seem to indicate that it is both a means adopted for the easier regulation of the business, and a tax in the nature of an excise imposed upon the privilege of doing it. In either case the State has power to make the exaction, and its exercise by the city under state authority violated no provision of the Federal Constitution * * *.

"It is not a valid objection to the ordinance that it partakes of both the character of a regulation and also that of an excise or privilege tax. The business is more easily subjected to the operation of the power to regulate, where a license is imposed for following the same, while the revenue obtained on account of the license is none the less legal because the ordinance which authorizes it fulfills the two functions, one a regulating and the other a revenue function. So long as the state law authorizes both regulation and taxation, it is enough, and the enforcement of the ordinance violates no provision of the Federal Constitution."

(B) THE SALE OF TOBACCO IS A SUBJECT OF POLICE REGULATION

A police regulation presupposes a condition, which unless restricted, guarded, or controlled, will operate to the detriment of the public health, morals, welfare, safety, or disadvantage. In the case of Austin vs. Tennessee, 179 U. S. 343, 348, this honorable court, speaking through Mr. Justice Brown, said:

> "Cigarettes do not seem until recently to have attracted the attention of the public as more injurious than other forms of tabacco; nor are we now prepared to take judicial notice of any special injury resulting from their use or to indorse the opinion of the Supreme Court of Tennessee that 'they are inherently bad and bad only.' At the same time we should be shutting our eyes to what is constantly passing before them were we to affect an ignorance of the fact that a belief in their deleterious effects, particularly upon young people, has become very general, and that communications are constantly finding their way into the public press denouncing their use as fraught with great danger to the youth of both sexes. Without undertaking to affirm or deny their evil effects, we think it within the province of the legislature to say how far they may be sold, or to prohibit their sale entirely, after they have been taken from the original packages or have left the hands of the importer, provided no discrimination be used as against such as are imported from other States, and there be no reason to doubt that the act in question is designed for the protection of the public health."

In State vs. Olsen, 26 North Dakota 304, 144 N. W. 661, an act preventing traffic in snuff was sustained. The court said:

> "There is a wide difference in the attitude of the courts toward statutes which restrict that which is

harmful and those which restrict that which is harmless. The courts can certainly take judicial notice that the use of tobacco in any form is uncleanly, and that its excessive use is injurious. They can take judicial notice of the fact that its use by the young is especially so. Tobacco, in short, is under the ban."

In State vs. Nossaman, 107 Kansas 715, 193 Pac. 347, 20 A. L. R. 921 wherein the Kansas act prohibiting the barter, sale or giving away of cigarettes, was sustained, the court said:

"For a number of years there has been a well settled opinion that the use of cigarettes, especially by persons of immature years was harmful, and the courts have recognized that they were deleterious in their effects. Their sale and use have been regulated and prohibited by legislative bodies, and these measures have been upheld as a proper exercise of the police power."

(C) THE STATUTE PROHIBITING THE ADVERTISING OF TOBACCO ON BILLBOARDS, IN STREET CARS, AND ON PLACARDS BEARS A REASONABLE RELATION TO THE OBJECT SOUGHT TO BE ACCOMPLISHED.

In the case of Rast vs. Van Deman, 240 U. S. 342, 36 Supreme Court, 370, it is said:

"It is the duty and function of the legislature to discern and correct evils, and by evils we do not mean some definite injury, but obstacles to a greater public welfare. Eubank vs. Richmond, 226 U. S. 137, 142; Sligh vs. Kirkwood, 237 U. S. 52, 59. And, we repeat 'it may make discriminations if founded on distinctions that we can not pronounce unreasonable and purely arbitrary.' Quong Wing vs. Kirkendall, 223 U. S. 59, 62, and the cases cited above."

Counsel have said in their brief, page 6, that "the 1923 act further provided against minors smoking in the establishments of tabacco dealers, thus reinacting a part of the 1921 act. However, in all other places a minor was and is at liberty to chew and smoke tobacco in all its forms without restriction and under the same conditions that an adult is permitted to use tobacco." The Utah statute, Section 8443, Compiled Laws of Utah, 1917, above quoted, does prohibit the possession and use of cigarettes and tobacco in any form by minors. It will be apparent after a review of the Utah statutes that it was the use of cigarettes and tobacco that was considered obnoxious and detrimental to the public health, welfare and morals. It is said that the prohibition of billboard advertising bears no reasonable relation to the object sought to be accomplished. In the first place minors may not use or possess tobacco in Utah. Therefore the State has done all that it can under conditions prevailing in the State to restrict and limit the inducement that may be held out to minors to use tobacco. It is a criminal act for a person under 21 years of age in Utah to buy, accept or have in his possession cigarettes or tobacco in any form. Certainly the State is interested in preventing its boys and girls under 21 years of age from becoming criminals. Therefore, if an inducement is held out which is attractive and alluring and intended to induce the boys and girls to violate the law and become criminals and at the same time partake of that which is deleterious, harmful and injurious to their bodies, surely a statute restricting or prohibiting the holding out of such inducement bears a reasonable relation to the object sought to be accomplished.

The legislature of Utah discerned an evil, viz., that the recruits into the rank of smokers and tobacco users come largely from the boys and girls under 21 years of age rather than from people of maturity. It was for the purpose of correcting that evil that the legislature of Utah prohibited all advertising of tobacco by its act of 1921. (App. No. 2) But when the Supreme Court of our State declared that advertising in newspapers, periodicals and magazines could not be prevented because it was an interference with interstate commerce, the legislature did all that it could do, under the circumstances, to curtail the inducement to use tobacco by prohibiting advertising on billboards, street car signs, and placards. We think that to prohibit the possession and use of cigarettes and tobacco in any form by minors, on the one hand, and to authorize the persuasion and inducement of minors to possess and use cigarettes and tobacco through unrestricted advertising on the other hand, is a palpable incongruity. The legislature must have considered and found that notwithstanding the passage of laws making it unlawful for anyone to give, sell, or furnish to any person under 21 years of age cigarettes, or tobacco in any form and making it unlawful for anyone under 21 years of age to buy, accept or have in his possession any cigarettes or tobacco in any form, that the tobacco habit has made great inroads into the youth of the State. The reason for the increased indulgence on the part of the youth is clear. There has not been in the past any restraint or restriction placed upon manufacturers and dealers in tobacco but they have been left free to appeal to the youth with the most alluring and attractive cigarette and tobacco advertisements with the result that the above mentioned laws have been practically nullified. Is it not inconsistent and absurd to pass laws prohibiting the sale to or the

possession of tobacco by minors and at the same time give dealers and manufacturers a free hand and permit them to solicit minors by advertisements of the most alluring and attractive nature that the genius and skill of the most expert can produce?

In Cooley's Constitutional Limitations, First Edition, page 187, it is said:

> "If evidence was required it must be supposed that it was before the legislature when the act was passed and if any special finding was required to warrant the passage of the particular act it would seem that the passage of the act itself might be equivalent to such finding."

In Powell vs. Pa., 127 U. S. 678, 32 L. Ed. 253, it was held that

> "And as it does not appear from the face of the statute or from the facts of which the courts must take judicial cognizance that it (the statute) infringe rights secured by the fundamental law, the legislative determination of those questions is conclusive upon the courts."

Therefore, it will be presumed that the legislature of Utah found and determined that the amount of advertising done by the tobacco manufacturers and dealers has amounted to a campaign of propaganda for the purpose of inducing the youth of the State to become users of tobacco and thus violate the laws of the State of Utah and become criminals.

In Armour vs. North Dakota, 240 U. S. 510, 36 Supreme Court Reports, 44, Mr. Justice McKenna said:

> "The court, by these remarks, expressed the test of a judicial review of legislation enacted in the ex-

> ercise of the police power, and in view of very recent decisions it is hardly necessary to enlarge upon it. We said but a few days ago that if a belief of evils is not arbitrary, we cannot measure their extent against the estimate of the legislature, and there is no impeachment of such estimate in differences of opinion, however strongly sustained. And by evils, it is said, there was not necessarily meant some definite injury but obstacles to a greater public welfare. Nor do the courts have to be sure of the precise reasons for the legislation, or certainly known them, or be convinced of the wisdom or adequacy of the laws. Rast vs. Van Deman and Lewis, ante, P. 342; Tanner vs. Little, ante, P. 369."

The legislature of the State of Utah, no doubt, took notice of the fact that the public highways in Utah are lined with a continuous string of billboards which are always thrusting their message, which is as attractive, alluring and appealing as man's dexterous hands and cunning mind can produce, upon the people of the State thus calling to the youth of this commonwealth without ceasing to partake of that which is uncleanly, in fact, harmful and injurious as a recognized truth and the obtaining or possession of which will make of them criminals in the eyes of the law. Certainly a statute which prevents or intends to restrict and minimize the appeal and inducement bears a reasonable relation to the object sought, viz., the general health, welfare and safety of the public, particularly the youth of the State.

(D) THE CLASSIFICATION MADE BY THE STATUTE INVOLVED IS NOT ARBITRARY AND DISCRIMINATORY.

1. THE TERMS OF THE STATUTE NEED NOT BE ALL EMBRACING BUT MAY CLASSIFY ACCORDING TO PREVAILING CONDITIONS.

In the case of Miller vs. Wilson, 236 U. S. 373, Mr. Justice Hughes said:

"The legislature is not debarred from classifying according to general considerations and with regard to prevailing conditions; otherwise, there could be no legislative power to classify * * *.

"It (the legislature) is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be clearest. As has been said, it may 'proceed cautiously, step by step,' and 'if an evil is specially experienced in a particular branch of business' it is not necessary that the prohibition should be couched in all-embracing terms."

In the case of Truax vs. Raich, 239 U. S. 33, 43, Mr. Justice Hughes again said:

"We have frequently said that the legislature may recognize degrees of evil and adapt its legislation accordingly. (St. Louis Cons. Coal Co. v. Illinois, 185 U. S. 203, 207. McLean vs. Arkansas, 211 U. S. 539, 551; Miller vs. Wilson, 236 U. S. 373, 384), *but underlying the classification is the authority to deal with that at which the legislation is aimed.*" (Italics ours)

Carroll vs. Greenwich Insurance Co., 199 U. S. 401, 411;
Tanner vs. Little, 240 U. S. 369;
Rast vs. Van Deman, 240 U. S. 342;
Smith vs. Cahoon, 283 U. S. 553;
State Board of Tax Commissioners vs. Jackson, 283 U. S. 527, 75 L. Ed. 1248.

It has been seen that the Utah legislature did attempt to prevent all kinds of advertising by the acts of 1921 and 1923 but when the Supreme Court of Utah held in the case of State vs. Salt Lake Tribune Publishing Company, 249 Pac. 474, that the legislature could not prohibit advertising in newspapers, magazines, periodicals or circulars because it was an undue interference with interstate commerce, then the

legislature did prohibit advertising on billboards, street car signs, placards or any other objects or places of display. This surely is legislating according to prevailing conditions in the State.

2. THE CLASSIFICATION IS NOT ARBITRARY AND DISCRIMINATORY BECAUSE BILLBOARDS, STREET CAR SIGNS AND PLACARDS ARE IN A CLASS BY THEMSELVES.

In determining whether a classification is discriminatory the motives or special reasons actuating the legislature are of no concern to the court; neither is the wisdom of the classification of consequence. The determining factor lies in the answer to the question does the burden fall alike upon all who are substantially in the same situation.

The legislature of the State has a right and power "to classify objects, upon its conception of the public welfare, the right of review to be exerted by the courts only when the legislation is unreasonable or purely arbitrary." Rast vs. Van Deman, supra.

It must be apparent that there is a difference between billboards, street car signs, and placards, on the one hand and newspapers, periodicals and magazines on the other. In the first place newspapers, magazines and periodicals circulate freely in interstate commerce, whereas billboards, placards and street car signs do not, but are purely local and intrastate. Newspapers, magazines and periodicals are movable, and permit of direct handling by the reader, whereas the billboard, placard and street car sign is entirely immovable, and does not permit of handling by the reader. Again, the advertising in a newspaper, magazine or periodical is seen

once, as a general proposition, and then the paper, magazine or periodical is put down or placed aside where the ad is not seen again, unless in a new edition of the newspaper, or magazine, whereas, the message of the billboard stands for weeks at a time always in the same position ever thrusting its message upon the passerby, who is called upon to see that particular advertisement time after time. Particularly is this true because billboards, street car signs, and placards are of purely a local character, and are confined to a particular definite locality, and as the people of that locality go to and from their work morning, noon, and night they are confronted with the advertisement of the billboard and placard. As they ride the street cars day after day the same advertising is there to greet them. This is not so in the case of the newspaper, magazine, or periodical. The advertisements on billboards, street car signs, and placards, are seen without the exercise of any volition by the observer. This is not true of the newspaper, magazine, periodical or radio. Further, it is true that billboards and placards are always placed in the most conspicuous places along the walks, streets and highways, and, as stated, are constantly and repeatedly impressing the message contained in the advertisement on the individual. Whereas, the impression made by the advertising in a newspaper, magazine or periodical, is usually made but once, and then the paper or magazine is discarded for a new issue.

What seems to us to be a distinction and difference which would place billboards, street car signs, and placards in a class by themselves, is the fact that but one poster need be put on a billboard, placard or street car sign, to keep the message before the public for weeks, or even months, where-

as, with newspapers, magazines, periodicals or radios, it requires the constant replacing of the advertising in order to keep the message before the public.

We believe that the above mentioned differences are sufficient to place billboards, placards and street car signs in a class by themselves.

It was said in the case of State Board of Tax Commissioners vs. Jackson, by Mr. Justice Roberts that: "The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the dicrimination is founded on a reasonable distinction. American Sugar Refining Company vs. Louisiana, 179 U. S. 89, 45 law edition 102, 21 Sup. Ct. 43, *or if any state of facts reasonably can be conceived to sustain it.*" (Citing cases, italics ours.)

It seems to us that the Jackson case is in point; the difference between the chain owned store and an individually owned store certainly is no greater than the difference between billboards, placards, and street car signs, on the one hand, and newspapers, magazines and periodicals, on the other.

It is said by counsel for appellant on page 11 of their brief that, "The sale of tobacco is not illegal in Utah, nor is it considered inimical to public health or morals. There is nothing detrimental to public health or morals in billboard advertising * * *."

It has been shown by what has been said above that the sale of tobacco to everyone under twenty-one years of age in Utah *is illegal,* and surely the legislature found and considered it to be inimical to the public health and morals when

it has made it a crime for anyone under twenty-one years of age to buy, accept, or have in his possession tobacco in any form. It must be conceded that billboard advertisements tend to induce those under twenty-one years of age to do that which the legislature has said they may not do. Therefore, it must follow that there is something detrimental to public health, safety, and morals in billboard advertising.

The language of Mr. Justice Stone in the case of Standard Oil Company vs. Marysville, 279 U. S. 582, 585, is pertinent. He said:

> "We need not labor the point, long settled, that where legislative action is within the scope of the police power, fairly debatable questions as to its reasonableness, wisdom and propriety, are not for the determination of courts, but for that of the legislative body, on which rests the duty of responsibility of decision" (citing cases).

Tanner vs. Little, 240 U. S. 369, 383, contains the following suggestion:

> "Let it be granted that the 'premium system' is a method of advertising, can there not be differences in advertising which may be subject to differences in legislation? Can there not be advertising at places or at times or in kind or effect, subversive of public order or convenience? Fifth Avenue Coach Company vs. New York, 221 U. S. 467; Commonwealth vs. McCafferty, 145 Massachusetts 384. However, a decisive answer to the questions need not be given for we have said in Rast vs. Van Deman, and Lewis ante, p. 342, that the 'premium system' is not one of advertising merely. It has other, and, it may be, dilatorius, consequences."

We think the case of Tanner vs. Little is in point here.

In the case of O'Gorman & Young vs. Hartford Fire Insurance Co., 282 U. S. 251, 257, in speaking of a statute of New Jersey which was attacked as being unconstitutional in that it limited the commissions allowable by insurers against loss by fire to local agents, Mr. Justice Brandeis said:

> "The statute here questioned deals with a subject clearly within the scope of the police power. We are asked to declare it void on the ground that the specific method of regulation prescribed is unreasonable and hence deprives the plaintiff of due process of law. * * * It does not appear upon the face of the statute, or from any facts of which the court must take judicial notice, that in New Jersey evils did not exist in the business of fire insurance for which this statutory provision was an appropriate remedy. The action of the legislature and of the highest court of the state indicates that such evils did exist."

In view of what has been said above and the cases cited we submit that Section 2 of the statute is a proper exercise of the police power of the State of Utah, and therefore, it does not violate the 14th amendment of the Constitution of the United States, and that appellant has not been denied equal protection of the laws because billboards, street car signs, and placards are in a class by themselves, and the burden falls the same upon all similarly circumstanced.

Counsel for appellant have said, on page 9 of their brief, "there is even less justification for distinguishing, as does Section 2, between display advertising of tobacco dealers on the fronts of their places of business, and display advertising by non-dealers everywhere."

We call attention to the fact that Section 2 does not permit of display advertising on the fronts of dealers' places of

business. All that is permitted is the placing of a sign which may merely state that he is a dealer in such articles. Surely, this does not permit of display advertising.

THE UTAH STATUTE WHICH PREVENTS APPELLANT FROM CARRYING OUT ITS CONTRACTS TO ADVERTISE TOBACCO ON BILLBOARDS, STREET CAR SIGNS AND PLACARDS DOES NOT DEPRIVE IT OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW.

1. Because the liberty of contract guaranteed by the Constitution is subject to reasonable regulation and restraint to safeguard the public interest, Liberty Warehouse Co. vs. Burley Tobacco Association, 276 U. S. 71, 97, and cases there cited.

In the very recent case of the Hardware Dealers Mutual Fire Insurance Company of Wisconsin vs. the Glidden Co., et al., decided Nov. 23, 1931, it is said:

> "The right to make contracts embraced in the concept of liberty guaranteed by the 14th amendment is not unlimited. Liberty implies only freedom from arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interest of the community, Chicago, Burlington & Quincy R. R. Co. vs. McGuire, 219 U. S. 549, 567. Hence, legislation otherwise within the scope of acknowledged state power, not unreasonably or arbitrarily exercised, cannot be condemned because it curtails the power of the individual to contract, McLean vs. Arkansas, 211 U. S. 539; Schmidtinger vs. Chicago, 226 U. S. 578; German Alliance Insurance Co. vs. Kansas, 233 U. S. 389; Erie Railroad vs. Williams, 233 U. S. 685; Keokee Con. Coke Co. vs. Taylor, 234 U. S. 224."

2. Because it has been shown by what has been said above that the Utah statute in question is not unreasonable and arbitrary, and that it does bear a reasonable relation to the proper purpose. There is nothing in the record to show or sustain the contention that the Utah statute is arbitrary and unreasonable.

We believe that appellant has not sustained the burden of proving the statute arbitrary and discriminatory. The statute deals with a subject within the scope of the legislative power.

In the case of Hardware Dealers Mutual Fire Insurance Company of Wisconsin vs. the Glidden Company, supra, Mr. Justice Stone said:

> "The records and briefs present no facts disclosing the reasons for the enactment of the present legislation or the effects of its operation, but as it deals with a subject within the scope of the legislative power the presumption of constitutionality is to be indulged. O'Gorman & Young, Inc., vs. Hartford Fire Insurance Company, 282 U. S. 251; see Standard Oil Co. vs. Marysville, 279 U. S. 582, 584; Ohio ex rel. Clarke vs. Deckebach, 274 U. S. 392, 397. We cannot assume that the Minnesota legislature did not have knowledge of conditions supporting its judgment that the legislation was in the public interest * * *."

It is not contended that the statute here in question is not an exercise of the police power, but as we read appellant's brief, they admit that tobacco is a subject of police regulation, and that the statute involved is a police measure. That being so the regulation is reasonable and not discriminatory, and we, therefore, need not reargue the matter here to show that appellant has not been deprived of his property without due process of law.

Powell vs. Pennsylvania, 127 U. S. 678, 684, contains this statement, quoting, "'every possible presumption' Chief Justice Waite said, speaking for the court in Sinking Fund Cases, 99 U. S. 700, 718, is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt."

SECTION 2 OF THE UTAH STATUTE IS NOT UNCONSTITUTIONAL AS PLACING AN UNREASONABLE RESTRAINT ON INTERSTATE COMMERCE.

1. BECAUSE IT DOES NOT APPEAR UPON THE FACE OF THE STATUTE OR FROM FACTS OF WHICH THE COURT MUST TAKE JUDICIAL COGNIZANCE THAT SECTION 2 PLACES AN UNREASONABLE RESTRAINT UPON INTERSTATE COMMERCE.

The questions as to where the contracts were entered into or where the cigarettes were manufactured or where the bill posters were made, are all questions of fact to be determined during the trial. These facts cannot be determined from any interpretation of the language of the statute, nor do they appear upon the face of the statute, nor are they facts of which the court must take judicial cognizance. Therefore, they may not be urged as rendering the statute unconstitutional.

One Cooley Con. Lim. (8th Ed.) p. 376, note 3, contains this statement: "The court will not go beyond the face of the law to seek for grounds for holding it unconstitutional".

Referring again to the case of State Board of Tax Commissioners vs. Jackson, supra, it was said therein:

> "The fact that a statute discriminates in favor of a certain class does not make it arbitrary if the discrimination is founded upon a reasonable distinction, (citing cases) or if any state of facts reasonably can be conceived to sustained it (citing cases)."

Surely a state of facts can reasonably be conceived to prevent Section 2 from imposing a restraint upon interstate commerce.

2. SECTION 2 DEALS ONLY WITH THAT WHICH IS INTRASTATE, AND THEREFORE, DOES NOT PLACE AN UNREASONABLE RESTRAINT UPON COMMERCE AMONG THE SEVERAL STATES.

Counsel for appellant, after citing the case of Ramsey Company vs. Bill Posters Association, 260 U. S. 501, say on page 18 of their brief:

> "The party contracting with the appellant for the display of the advertisement to be shipped in interstate commerce intended that the particular advertisement should be shipped to the appellant, and did not contemplate that the movement of the advertisement should cease until it was displayed upon the appellant's billboards throughout the State of Utah. The interstate character of the shipment therefore, continued until the advertisement had been displayed upon the billboards as contemplated by the parties."

We call attention to the fact that there isn't anything before this court, either in the record or in the brief, to show what the parties to the contract intended or contemplated. The contracts were not introduced in evidence, neither was evidence adduced on this point, and we submit that this Honorable Court cannot take judicial cognizance of what the parties intended or contemplated. Therefore, it appears to us that the above statement of counsel is entirely beside the point, and can have no bearing upon the issue.

We believe that counsel for appellant have misconceived the holding in the Ramsay case. The court does not say, in that case, that posters are articles of interstate commerce until they are actually displayed upon the billboards. The court seems to have based its decision upon the theory that there was a nation-wide combination under which the members of the association were bound by agreement, to pursue a certain course of business which was designed and adequate to materially interfere with the free flow of commerce among the states.

Section 2 of the Utah statute is not discriminatory, but operates upon all billboards advertising tobacco equally. We submit that advertising upon billboards is entirely intrastate. Austin vs. Tenn., supra.

In the absence of proof to the contrary it must be presumed that the posters which were displayed upon the billboards reached their final destination and came to rest as property within the state and had long since lost their character as interstate commerce prior to being displayed upon the billboards. Sonneborn Bros. vs. Keeling, 262 U. S. 506, 67 Law Edition 1095.

CONCLUSION.

In view of what has been said and the cases cited, we respectfully submit that the statute in question is valid as a police measure, and that the decision of the Supreme Court of Utah should be affirmed.

GEORGE P. PARKER,
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APPENDIX I.

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, *Appellant*,
vs.
THE PACKER CORPORATION, *Respondent*. } No. 5036

Filed April 7, 1931.

FOLLAND, J.

This is a prosecution by the state commenced in the City Court of Salt Lake City. The complaint charged the defendant with committing the crime of violating Sec 2, Chap. 145, Laws Utah 1921, as amended by Chap. 52, Laws Utah 1923, and as amended by Chap. 92, Laws Utah 1929, as follows:

> "That the said Packer Corporation, at said time and place, did display on a billboard owned and operated by the defendant, an advertisement of Chesterfield Cigarettes by displaying a representation of a package of Chesterfield Cigarettes with the words, 'Chesterfield Cigarettes, They Satisfy,' contrary to the provisions of the Statute," etc.

The defendant interposed general and special demurrers on the grounds, among others, that the facts stated in the complaint did not constitute a public offense and that the statute upon which the complaint is based violates the provisions of Article I, Section 1 of the Constitution of Utah with

respect to the inherent and inalienable right of defendant to acquire, possess and protect its property, of Article I, Section 7, with respect to deprivation of property without due process of law, of Article I, Section 18, with respect to impairing the obligation of contracts of Article I, Section 24, relating to uniform operation of all laws of a general nature, and as being in conflict with Article I, Section 8, of the Constitution of the United States relating to interstate commerce, with Artile I, Section 10, respecting impairing of the obligations of contracts, with Article IV, Section 2, respecting the privileges and immunities of citizens in the several states, and the Fourteenth Amendment of the Constitution of the United States respecting the deprivation of property without due process of law, and/or respecting the denial to persons within the jurisdiction of the State of Utah of the equal protection of the laws.

In the city court the defendant was found guilty, but upon appeal to the district court, the demurrer was sustained and the state refusing to amend, the action was dismissed. The state appeals.

The validity of the act is defended by the state upon the ground that it is a proper and legitimate exercise of the police power of the state and that the act in no particular offends against any of the constitutional provisions of the state or of the United States.

The provision with respect to advertising cigarettes and tobacco on billboards is Section 2, of Chapter 52, Laws Utah 1923, as amended by Chapter 68, Laws Utah 1925, and by Chapter 92, Laws Utah 1929 (further amended by Chapter 5, Laws Utah 1930, after this action was commenced, but

which does not change the situation as to the particular question involved,) which section is as follows:-

> "It shall be a misdemeanor for any person, company, or corporation, to display on any billboard, street car sign, street car, placard, or on any other object or place of display, any advertisement of cigarettes, cigarette papers, cigars, chewing tobacco, or smoking tobacco, or any disguise or substitute of either except that a dealer in cigarettes, cigarette papers, tobacco, or cigars or their substitutes, may have a sign on the front of his place of business stating that he is a dealer in such articles, provided that nothing herein shall be construed to prohibit the advertising of cigarettes, cigarette papers, chewing tobacco, smoking tobacco, or any disguise or substitute of either in any newspaper, magazine or periodical printed or circulating in the State of Utah."

The act of which this advertising feature is a part, is for the regulation and restriction of the sale, use and advertising of cigarettes and tobaccos, and includes the following:

1. The licensing of cigarette dealers by cities, towns and counties upon payment of a license fee.

2. The imposition of a tax to be paid to the state upon all packages of cigarettes sold.

3. Prohibiting the advertising of cigarettes and tobaccos on billboards, placards, and in street cars.

4. Prohibiting the sale or furnishing of cigarettes or tobaccos to minors under 21 years of age.

5. Making it unlawful for proprietors of places of business to knowingly permit minors under 21 years of age to frequent such places while using tobacco in any form.

6. Vesting power in the licensing authority to revoke the license of any dealer for violation of the act, no new license to be granted such dealer within two years after such revocation.

7. Regulations with respect to the tax feature, looking to the collection of the stamp tax.

It is apparent from the act itself, as well as from the history of the legislation on the subject, that the purpose of the act was to regulate and restrict the sale and use of cigarettes and tobacco. In Chapter 145, Laws Utah 1921, p. 390, the legislature prohibited the sale of cigarettes and cigarette papers within the state and also prohibited smoking of tobacco in public places, and the advertising of tobacco in any form. Because of the widespread use of cigarettes, the law was unpopular and difficult if not impossible of enforcement. The legislature in 1923 repealed all but one section of the 1921 law and enacted substantially the present law. It is evident the intent of the legislature was a relaxation merely, and not an abandonment of its policy of restriction. As an incident, and as a more efficient means of regulation, the act requires payment of a license fee by dealers and the payment of an excise tax on cigarettes. The fact that a considerable revenue is raised and paid into the public treasury does not itself indicate that the act was passed as a revenue measure, nor destroy its character as a regulatory act passed in the exercise of the police power, where the object is to control, regulate and restrict, rather than to encourage the traffic. 15 R. C. L. 288; 26 R. C. L. 17; Town of Phœbus v. Manhattan Social Club, 105 Va. 144, 52 S. E. 839. That the act is regulatory in its nature and purpose is shown by the fact that in addition to the imposition of the stamp tax, it requires a license and

payment of a license fee, prohibits sales to minors under 21, and smoking by minors in stores, shops and other places, restricts the advertising of cigarettes and tobaccos, and grants power to the licensing power to revoke or refuse licenses in the event of violation of any of the provisions of the act.

A police regulation presupposes a condition which, unless restricted, guarded, and controlled, will operate to public disadvantage. The courts have held, without exception, that the state, in the exercise of the police power may license, tax, and regulate the sale and use of cigarettes and tobacco and may go so far as to prohibit the traffic entirely.

In Gundling v. Chicago, 176 Ill. 340, 52 N. E. 44, 48 L. R. A. 230 it was held that an ordinance regulating the sale of tobacco in one of its forms, i. e., cigarettes, was a health and welfare measure within the exercise of the police power. This case was affirmed on appeal to the United States Supreme Court in 177 U. S. 183, 44 L. Ed. 725, 20 Sup. Ct. 633, wherein it was said:

> "The amount of the fee is fixed by the common council for the privilege of doing business, and the text of the ordinance and the amount of the fee named therein would seem to indicate that it is both a means adopted for the easier regulation of the business, and a tax in the nature of an excise imposed upon the privilege of doing it. In either case the State has power to make the exaction, and its exercise by the city under state authority violates no provision of the Federal Constitution * * *
>
> "It is not a valid objection to the ordinance that it partakes of both the character of a regulation and also that of an excise or privilege tax. The business is more easily subjected to the operation of the power to regulate, where a license is imposed for following

the same, while the revenue obtained on account of the license is none the less legal because the ordinance which authorizes it fulfills the two functions, one a regulating and the other a revenue function. So long as the state law authorizes both regulation and taxation, it is enough, and the enforcement of the ordinance violates no provision of the Federal Constitution."

In Austin v. State, 101 Tenn. 563, the court held that cigarettes are not a legitimate article of commerce. This case went to the Supreme Court of the United States, and that court, while holding that the cigarette was a legitimate article of interstate commerce, also held that it was, however, to the same extent as intoxicating liquors subject to regulation under the police power of the state. The court said:

"Cigarettes do not seem until recently to have attracted the attention of the public as more injurious than other forms of tobacco; nor are we now prepared to take judicial notice of any special injury resulting from their use or to indorse the opinion of the Supreme Court of Tennessee that 'they are inherently bad and bad only.' At the same time we should be shutting our eyes to what is constantly passing before them were we to affect an ignorance of the fact that a belief in their deleterious effects, particularly upon young people, has become very general, and that communications are constantly finding their way into the public press denouncing their use as fraught with great danger to the youth of both sexes. Without undertaking to affirm or deny their evil effects, we think it within the province of the legislature to say how far they may be sold, or to prohibit their sale entirely, after they have been taken from the original packages or have left the hands of the importer, provided no discrimination be used as against such as are imported from other States, and there be no reason to doubt that the act in question is designed for the protection of the public health." (179 U. S. 343)

In State v. Olson, 26 N. D. 304, 144 N. W. 661, an act prohibiting traffic in snuff was sustained. The court said:

> "There is a wide difference in the attitude of the courts toward statutes which restrict that which is harmful and those which restrict that which is harmless. The courts can certainly take judicial notice that the use of tobacco in any form is uncleanly, and that its excessive use is injurious. They can take judicial notice of the fact that its use by the young is especially so. Tobacco, in short, is under the ban."

In State v. Nossaman, 107 Kans. 175, 195 Pac. 347, 20 A. L. R. 921, wherein the Kansas act prohibiting the barter, sale or giving away of cigarettes was sustained, the court said:

> "For a number of years there has been a well settled opinion that the use of cigarettes, especially by persons of immature years, was harmful, and the courts have recognized that they were deleterious in their effects. Their sale and use have been regulated and prohibited by legislative bodies, and these measures have been upheld as a proper exercise of the police power."

We refer to these cases—not that they decide the question before us as to the validity of restrictions on advertising—but because they show that tobacco and cigarettes are classed by the courts as agencies harmful to health and welfare, and are subject to restriction, control, and regulation within the exercise of the police power.

It is well settled in this state, as elsewhere, that the courts will not declare a statute unconstitutional unless it clearly and manifestly violates some provision of the constitution of the state or of the United States. Every presumption must be indulged in favor of the constitutionality of an act, and

every reasonable doubt resolved in favor of its validity. Utah State Fair Assn. v. Green, 68 Utah 251, 249 Pac. 1016. The whole burden lies on him who denies the constitutionality of a legislative enactment. Brown v. Maryland, 12 Wheat. (U. S.) 436. If by any fair interpretation of the statute the legislation can be upheld, it is the duty of this court to sustain it, even though judges may view the act as inopportune or unwise; and it is not within the province of the judiciary to question the wisdom or the motives of the legislature in the enactment of a statute. Utah State Fair Assn. v. Green, supra. The provision in question was regularly passed by the legislature and approved by the Governor. The presumption should be and is in favor of validity. It must be assumed that the legislative department, whose members pledged themselves by oath to support the constitution, has not lightly disregarded that pledge. The act must be upheld and enforced unless it manifestly bears no relation to public health, morals, welfare, or other legitimate object of the police power, or, if it does bear such relation, unless it is a plain invasion of constitutional rights.

The scope of the police power is briefly defined, and the function of legislatures and courts with relation thereto well stated by Mr. Justice Marshall in State v. Redmon, 134 Wis. 89, 114 N. W. 137, 140, 14 L. R. A. (N. S.) 229, as follows:

> "Many attempts have been made to define police power. There is good reason to say that the multitude of such attempts with the many variations in phrasing the matter have not added very much to the simple expression, that it is the power to make all laws, which in the contemplation of the constitution promote the public welfare. That both defines the power and states the limitations upon its exercise, it being understood that it is a judicial function to determine the prop-

subject to be dealt with, and that it is a legislative function, primarily, to determine the manner of dealing therewith, but ultimately a judicial one to determine whether such manner of dealing so passes the boundaries of reason as to overstep some constitutional limitation, express or implied."

The rule as to judicial interference with legislative enactment pursuant to the police power is stated as follows in 6 R. C. L. 242:

"In order to sustain legislation under the police power the courts must be able to see that its operation tends in some degree to prevent some offense or evil, or to preserve public health, morals, safety and welfare; and if a statute discloses no such purpose and has no real or substantial relation to these objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts so to adjudge; and thereby give effect to the constitution. Only in cases, however, where the legislature exceeds its powers, will the courts interfere or set up their judgment against that of the legislature. Where an act has a real and substantial relation to the police power, then no matter how unreasonable nor how unwise the measure itself may be, it is not for the judicial tribunals to avoid or vacate it upon constitutional grounds, nor will the courts assume to determine whether the measures are wise, or the best that might have been adopted; or whether such laws are invalid on the ground of inexpediency, or whether they bear any real or substantial relation to the public welfare."

The traffic in and use of cigarettes and tobacco being a proper subject to be dealt with by the legislature, it is a legislative function, primarily, to determine the manner in which and extent to which it will deal with such subject matter. State v. Redmon, supra. The legislature has, as a part of its program of regulation, prohibited the advertising of cigarettes and tobaccos on billboards and other placards in street cars

and elsewhere. As was said by Mr. Justice Stone, speaking for a unanimous court in Standard Oil Co. v. Marysville, 279 U. S. 582, at page 585:

> "We need not labor the point, long settled, that where legislative action is within the scope of the police power, fairly debatable questions as to its reasonableness, wisdom and propriety are not for the determination of courts, but for that of the legislative body on which rests the duty and responsibility of decision."

Had the sale of cigarettes been prohibited entirely, there could be no serious question but that the advertising of them, at least by local agencies, could be lawfully prohibited. Solomon v. Cleveland (Oh. App.) 159 N. E. 121.

In dealing with the subject, the legislature did not see fit to go further and impose more or other restrictions upon the traffic, nor to prohibit it entirely as it might have done, nor to prohibit all and every sort and kind of advertising. The reason it did not prohibit other kinds of advertising will be discussed hereafter in this opinion. Police laws need not necessarily be omnibus in character, and it is permissible to legislate against one form of evil, even though other and similar evils have not been condemned. State v. Olson, supra; State v. Nossaman, supra. It was said by the Supreme Court of the United States in Miller v. Wilson, 236 U. S. 373, 35 Sup. Ct. 342, 59 L. Ed. 628, L. R. A. 1915F 829:

> "The legislature is free to recognize degrees of harm and may confine its restrictions to those classes where it deems the need is greatest, and if the law hits an evil where it is most felt the prohibition need not be all-embracing."

In Truax v. Raich, 239 U. S. 33, the court said:

> "We have frequently said that the legislature may recognize degrees of evil and adapt its legislation accordingly (St. Louis Consol. Coal Co. v. Illinois, 185 U. S. 203, 207; McLeon v. Arkansas, 211 U. S. 539, 551; Miller v. Wilson, 236 U. S. 373, 384); but underlying the classification is the *authority to deal with that at which the legislation is aimed.*" (Italics added.)

Advertising is a form of soliciting. State v. J. P. Bass Publ. Co., 104 Me. 288, 71 Atl. 894. We see no reason why the state which may prohibit or limit the sale of this article, may not also limit or restrict the solicitation of the sale, especially where, as here, it has prohibited the sale to minors. Such solicitation by advertisment is for the purpose of increasing the demand for and use of tobacco. These advertisements do not appeal alone to the class of persons who may lawfully purchase and use cigarettes and tobacco; they are general in their nature and appeal to all classes and ages of our population. It is inconsistent to say that the legislature may lawfully prohibit the sale of tobacco to minors of both sexes, but is without power to place any restriction on the solicitation of such persons by advertisements. Laws have been enacted in almost every state in the Union prohibiting the sale of tobacco or some of its manufactured forms to minors, but notwithstanding the enactment of these laws and the attempt to enforce them, the tobacco habit has made great inroads into the youth of the country. The reason would seem quite plain. Manufacturers and dealers have been left free to appeal to the boys and girls as well as adults with most alluring and attractive cigarette and tobacco advertisements, with the result that these laws have become largely ineffective. It is almost useless to pass laws prohibiting the sale of to-

bacco to minors, and at the same time make no attempt to restrict the solicitation of these same minors by all kinds of alluring and attractive advertisements. The recruits into the ranks of the smokers come largely from the boys and girls rather than from people of maturity. The prohibiting of billboard and other placard advertising has a direct bearing and relation to the object of the act in attempting to prevent the sale to and use of cigarettes and tobacco by minors. The legislature could well have concluded that the kind and amount of advertising done by the tobacco manufacturers and dealers has amounted to a campaign of propaganda for the purpose of inducing the youth of the community to become users of tobacco in its various forms. We think it clearly within the power of the legislature, when it undertook to combat or diminish the evil of smoking among young people, to not only prohibit the sale of these products to minors but also to strike at a most effective and insidious method of inducement habitually used to lure the youth into the use of these products by prohibiting the advertising of cigarettes and tobacco on billboards, placards and in street cars.

It is apparent the legislature believed that in the use, sale and advertising of cigarettes and tobacco there were evils inimical to the public welfare which required regulation and restriction. In Rast v. Van Deman, 240 U. S. 342, 36 Sup. Ct. 370, it is said:

> "It is the duty and function of the legislature to discern and correct evils, and by evils we do not mean some definite injury, but obstacles to a greater public welfare. Eubank v. Richmond, 226 U. S. 137, 142, 57 L. Ed. 156, 158, 42 L. R. A. (N. S.) 1123, 33 Sup. Ct. Rep. 76, Ann. Cas. 1914B 192; Sligh v. Kirkwood, 237 U. S. 52, 59, 59 L. Ed. 835, 837, 35 Sup. Ct. Rep. 501. And,

> we repeat, 'it may make discriminations if founded on distinctions that we cannot pronounce unreasonable and purely arbitrary.' Quong Wing v. Kinkendall, 223 U. S. 59, 62, 56 L. Ed. 350, 351, 32 Sup. Ct. Rep. 192 and the cases cited above."

In Armour v. North Dakota, 240 U. S. 510, 36 Sup. Ct. 440, Mr. Justice McKenna, speaking for the unanimous court gave expression to views which are pertinent here. A statute requiring that lard sold in packages be in packages of certain sizes was assailed as offending against the equal protection clauses of the Fourteenth Amendment of the Constitution and also on other grounds. The State Supreme Court in its opinion had said:

> "The expert who drafted the law, the legislature who passed it, and the governor who approved it, all thought necessity existed for such a measure. If we did not agree with all those, we might well hesitate to say that there was absolutely no doubt upon the question, but in fact a majority of this court believes the law not only reasonable, but necessary, and this belief is founded upon the evidence in this case and upon facts of which this court can take judicial notice."

After quoting the above from the state court, Mr. Justice McKenna says:

> "The court, by these remarks, expressed the test of a judicial review of legislation enacted in the exercise of the police power, and in view of very recent decisions it is hardly necessary to enlarge upon it. We said but a few days ago that if a belief of evils is not arbitrary, we cannot measure their extent against the estimate of the legislature, and there is no impeachment of such estimate in differences of opinion, however strongly sustained. And by evils, it was said, there was not necessarily meant some definite injury, but obstacles to a greater public welfare. Nor do the

courts have to be sure of the precise reasons for the legislation, or certainly known them, or be convinced of the wisdom or adequacy of the laws. Rast v. Van Deman & L. Co.; Tanner v. Little, 240 U. S. 342, 60 L. Ed. 691, 36 Sup. Ct. Rep. 370, 379."

We are not unmindful that the complaint in this case describes the advertisement complained of as merely representing a package of Chesterfield cigarettes with the words "Chesterfield Cigarettes, They Satisfy." We would, however, be derelict in our duty, in passing upon the validity of this enactment, if we fail to see what every seeing person may see, or refuse to know what every person in the community does know. One cannot walk or ride along a public street or highway without being continually attracted by artistic and fascinating billboard advertisements featuring beautiful girls and handsome young men calling attention to the alleged virtues of the various brands of cigarettes and smoking tobacco.

It is claimed by respondent that there is an unjust discrimination in the law, in that only advertising by billboards, street car signs, and placards are prohibited, while advertising by newspapers, magazines, and radio are permitted. Most of the advertising in magazines, newspapers and by radio is involved in interstate commerce and cannot be reached by state regulation. State v. Salt Lake Tribune Pub. Co., 68 Utah 187, 249 Pac. 474. Section 2, Chapter 52, Laws Utah 1923, made unlawful the advertising of tobacco in its various forms in newspapers, magazines, and pamphlets as well as on billboards and street car signs and placards. The provisions of this act so far as applicable to newspapers circulating in several states, was by this court in State v. Salt Lake Tribune Pub. Co., supra, held invalid as an undue interfer-

ence with interstate commerce. Thereafter the section was amended by Laws Utah 1929, Chap. 92, so as to make its restrictions applicable only to advertisements by billboards, placards, and street car signs. It has been held that an act which prohibits local newspapers printed and circulated within the state from advertising tobacco, while permitting the circulation within the state of newspapers printed outside the state, is violative of constitutional provisions. Little v. Smith, 124 Kans. 237, 257 Pac. 959, 57 A. L. R. 100. Here, however, there is no such discrimination. Billboards, street car signs and placards and such are in a class by themselves. They are wholly intrastate, and the restrictions apply without discrimination to all in the same class.

Advertisements of this sort are constantly before the eyes of observers on the streets and in street cars to be seen without the exercise of choice or volition on their part. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. The young people as well as the adults have the message of the billboard thrust upon them by all the arts and devices that skill can produce. In the case of newspapers and magazines, there must be some seeking by the one who is to see and read the advertisement. The radio can be turned off, but not so the billboard or street car placard.

These distinctions clearly place this kind of advertisement in a position to be classified so that regulations or prohibitions may be imposed upon all within the class. This is impossible with respect to newspapers or magazines. The classification therefore is not arbitrary or unreasonable, and when made there is no legal reason why the classification cannot be sustained as within legislative power.

The subject matter of the act, that is, the use, sale and advertising of cigarettes and tobaccos is one upon which the legislature has a lawful right to exercise its power. In making classifications the power of legislation over the subject matter is of vital importance. This was discussed in Tanner v. Little, 240 U. S. 369, 36 Sup. Ct. 379, wherein advertising by means of trading stamps was distinguished from other forms of advertising, wherein it was said after citing illustrations of lawful classifications:

> "Those were instances (and others might be cited) of the regulation of conduct and the restriction of its freedom, it being the conception of the legislature that the regulation and restriction were in the interests of the public welfare. Those classifications were sustained as legal, being within the power of the legislature over the subject matter, and having proper bases of community.
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> "But the classification which was sustained in St. Louis Coal Co. v. Illinois, 185 U. S. 203, 46 L. Ed. 872, 22 Sup. Ct. Rep. 616, was condemned in Truax v. Raich, 239 U. S. 33, 60 L. Ed. 131, 36 Sup. Ct. Rep. 7. The statute in the latter case required employers of more than five workers at any one time to employ not less than 80% qualified electors or native born citizens of the United States or of some subdivision of such. The statute was held void because there was no authority to deal with that at which the legislation was aimed. And this is important to be kept in mind. If there is no such authority, a classification, however logical, appropriate or scientific, will not be sustained; if such authority exist, a classification may be deficient in these attributes, may be harsh and oppressive, and yet be within the power of the legislature. This has been declared many times. Let us apply the test to the case at bar. Let it be granted that the 'premium system' is a method of advertising; can there not be differences in advertising which may be subject to dif-

ferences in legislation? Can there not be advertising at places or at times or in kind or effect subversive of public order or convenience? Fifth Ave. Coach Co. v. New York, 221 U. S. 467, 55 L. Ed. 815, 31 Sup. Ct. Rep. 709, Commonwealth v. McCafferty, 145 Mass. 384, 14 N. E. 451."

It is true as urged by respondent that the classification, to be valid, "must rest upon some ground of difference having a fair and substantial relation to the object of legislation, so that all persons similarly circumstanced shall be treated alike." Royster Guano Co. v. Virginia, 253 U. S. 412. The classification here made is one which meets this requirement. Certainly all persons similarly situated are treated alike, since the law applies equally to all engaged in billboard advertising. From what has been said heretofore it must be apparent that the "ground of difference" bears a "fair and substantial relation to the object of legislation."

It is possible that advertisements in newspapers and magazines may be equally attractive and alluring and are probably equally effective. Opinions may differ as to the respective effectiveness of one form of advertising compared with another. Advertisements on a billboard, placard, or street car are wholly intrastate and may be reached by state legislative action, while advertisements in newspapers and magazines are or may be in interstate commerce and cannot for that reason be controlled by the state. After this court had declared unconstitutional the act prohibiting advertising of cigarettes in newspapers having a circulation beyond the state lines as interference with the interstate commerce, the legislature enacted the present provision going, as it believed, as far as it had lawful power to go in the direction of curbing the advertisements of tobacco, and, to prevent the

act from being in direct conflict with the law as announced by the courts (State v. Salt Lake Tribune Pub. Co., supra; Little v. Smith, supra) exempted from the operation of the act the advertising of such articles in newspapers, magazines and periodicals printed or circulating in the state.

We conclude that the statute in question was enacted within the lawful exercise of legislative power in the interest of public health, morals and welfare, because the advertising of cigarettes and tobacco has a relation, real and substantial, to the public welfare, that the belief of evils sought to be reached by the legislation was not arbitrary, but such evils were obstacles to a greater public welfare. There is no deprivation of due process of law, nor a denial of equal protection of the laws, the classification adopted by the legislature is not without good reason, so that all similarly circumstanced are treated alike. Such restrictions upon the use of property and the right to contract will be sustained where imposed in the interest of the welfare of the whole people. It is not for us to set up our views as to the wisdom or effectiveness of such legislation. The responsibility for determining the policy of the state in such matters is upon the Legislative Department.

The judgment of the district court is reversed.

We concur: ....

STRAUP, J. (Dissenting)

I dissent. Since the various acts on the subject are referred to in the prevailing opinion as regulatory measures, I think it well to further notice them. In 1921, (Laws of Utah

1921, Chap. 145,) the legislature passed an act making it unlawful to sell cigarettes and cigarette papers in the state, to advertise cigarettes or cigarette papers, for proprietors to permit minors to frequent their places of business while using tobacco, and forbidding any person to smoke in certain enclosed public places. By section 1 it thus was provided that it was a misdemeanor for any person, etc. "to barter, sell, keep for sale, furnish or give away, any cigarettes or cigarette papers," to any one. Section 2 forbade any person, etc. "to write, print, publish or circulate in any newspaper, magazine, periodical or circular written, printed or published within the state of Utah, any advertisement of cigarettes or cigarette papers, and to post, exhibit, or publish on any street-sign, placard or billboard * * * any advertisement for cigarettes or cigarette papers." The prohibition of the sale or advertisement of tobacco related only to cigarettes and cigarette papers. By Section 3 of the act it was made a misdemeanor for a proprietor of any place of business to knowingly permit minors under 21 years of age to frequent such place of business *while in the act of using tobacco in any form.* By section 4 it was made a misdemeanor for any person to smoke cigars, cigarettes or tobacco in any enclosed public place within the state, including dining rooms in hotels, restaurants, cafes and cafeterias, on street cars, in railway passenger coaches, railway station waiting rooms, barber shops, and in state, county, and city buildings.

As indicated in the prevailing opinion, and as is common knowledge, the act forbidding the sale and use of cigarettes and cigarette papers and of smoking in some of the enumerated public places, such as restaurants, hotel dining rooms, and in some other public places, met with such general dis-

approval and was so openly disregarded that the next legislature, Laws of Utah 1923, Chap. 52, repealed it, including the prohibition of the sale of cigarettes and cigarette papers and in lieu thereof provided that it was unlawful for any person, etc. "to sell or offer for sale, cigarettes or cigarette papers in the State of Utah, without first having obtained a permit therefor," to be granted by boards of city commissioners, city councils, boards of trustees of towns, and boards of county commissioners in territory outside of any city or town. To obtain the permit and license to sell cigarettes and cigarette papers, the licensee was required to pay "an annual license fee," from $100 to $25, and a "tax" from one to two mills on each cigarette, one-half cent on a package of fifty cigarette papers, one cent on one hundred papers, and one-half cent for each fifty papers exceeding one hundred papers. Thus, on obtaining the permit and paying the annual license fee and the tax, the sale of cigarettes and cigarette papers was again made lawful and the traffic and business therein permitted to be carried on as any other lawful business. The act, however, forbids any one from selling or furnishing tobacco of any kind to a minor under 21 years of age, which was but a reenactment of Sec. 8442, Comp. Laws Utah 1917, and in force in this state for many years. By the act it was further provided that it was unlawful for a proprietor of any place of business to knowingly permit minors under 21 years of age to frequent such place of business while in the act of using tobacco in any form, which was but a reenactment of the provision in such particular of the Laws of 1921. However at and in all other places, a minor was and is at liberty to chew and smoke tobacco in all its forms without restriction and under the same conditions that an adult is permitted to use tobacco.

With respect to the advertising or display of tobacco, including cigarettes, section 2 of the act of 1923 provided:

> "Sec. 2. ADVERTISING OR DISPLAY OF TOBACCO, CIGARETTES, ETC. It shall be a misdemeanor for any person, company or corporation to write, print, publish, or circulate in any newspaper, magazine, periodical or circular written, printed or published within the State of Utah, or any street-sign, placard, or billboard, street-car, package or merchandise other than the merchandise licensed in this Act, or any other place of display, any advertisement of cigarettes or cigarette papers, cigars, chewing tobacco or smoking tobacco or any disguise or substitute of either of these except that a dealer in tobacco and cigars may have a sign on the front of his place of business stating that he is dealing in such articles, and excepting further that cigars, chewing tobacco and smoking tobacco may be advertised in any newspaper published within the State of Utah, provided, however, that nothing herein shall be so construed as to permit advertising of cigarettes in any manner.
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> "Nor shall any cigarettes or cigarette papers, or any advertisement thereof, be displayed in any store-window, in the State of Utah, provided however, that nothing in this section contained shall be construed so as to prohibit the display of tobacco and the advertisements thereof, other than cigarettes and the advertisements thereof, in store windows."

The act also modified the provision of the Laws of 1921 as to smoking in enclosed public places, and since then and now smoking in restaurants, dining rooms of hotels, and in other enumerated enclosed public places, even in the inviolable sanctity of a barber shop, is permitted. It is thus seen that the main feature of the Act of 1923 is a revenue measure and whatever regulatory character it may have relates to the subject of advertising of tobacco.

A consideration of section 2 of the Act of 1923 in such respect was before this court in the case of State v. Salt Lake Tribune Pub. Co., 68 Utah 187, 249 Pac. 474. The case involved the right of the publishing company printing a newspaper in Utah and circulating therein and among the several states, to publish in its newspaper an advertisement of Lucky Strike Cigarettes. The Act as is seen forbade such an advertisement. It was held unconstitutional as constituting an inference with the interstate commerce clause of the federal constitution. The court, however, expressly stated, that having reached such conclusion, it found it unnecessary to express an opinion and expressed none as to the validity of the Act in other respects.

Thereafter, by Laws of Utah 1929, Chap. 92, the legislature amended Section 2 of the Laws of 1923. Chapter 92 is entitled, "Advertising Cigarettes and Tobacco." The enacting clause is, an act amending Sec. 2, Chap. 52, Laws of Utah 1923, "relating to the advertising, or display of tobacco, cigars, cigarettes and cigarette papers." The section as so amended and under which the defendant was prosecuted for advertising on a billboard "Chesterfield Cigarettes, they satisfy" and which section the court below held unconstitutional, is as follows:

> "It shall be a misdemeanor for any person, company, or corporation, to display on any billboard, street car sign, street car, placard, or on any other object or place of display any advertisement of cigarettes, cigarette papers, cigars, chewing tobacco, or smoking tobacco, or any disguise or substitute of either, except that a dealer in cigarettes, cigarette papers, tobacco, or cigars or their substitutes, may have a sign on the front of his place of business stating that he is a dealer in such articles, provided that

nothing herein shall be construed to prohibit the advertising of cigarettes, cigarette papers, chewing tobacco, smoking tobacco, or any disguise or substitute of either in any newspaper, magazine or periodical printed or circulating in the State of Utah."

By the amendment it is seen that it is unlawful to advertise tobacco in any form, including cigarettes, or any substitute thereof, on any billboard, street car sign, or placard, etc., but is lawful, without restriction, to advertise all kinds of tobacco, including cigarettes and cigarette papers, in any newspaper, magazine or periodical, printed or circulated wholly within the state or among the several states.

It is the validity of that provision which here is drawn in question. The question is not to be set aside or displaced by interjecting another thought to be more easily or readily disposed of. It is not now the question as to what the legislature in the legitimate exercise of the police power may do with respect to prohibiting, regulating or controlling the manufacture, sale, traffic or use of tobacco. It is enough now to know that no such legislation of the state has been attempted. It is time enough to express an opinion concerning it when that is done. The question thus is not what the legislature in such respect may do, but what it has done. Hence, the cited cases in the prevailing opinion as I think are not applicable. None of them uphold such kind of legislation as is here involved and drawn in question. And it in effect is conceded that the cited cases in the prevailing opinion have no direct application to the question in hand.

If the Act is valid and it thus is unlawful to advertise cigarettes on a billboard, then, too is it unlawful to advertise on a bill board cigars or any other form of tobacco.

That engaging in the business of selling and dealing in tobacco including cigarettes is a lawful pursuit is not disputed. Attempt was made by the Act of 1921 to prevent the sale of cigarettes. But that act was repealed in 1923, and since then, as presently will be noticed, it is just as lawful to sell cigarettes as it is to sell any other form of tobacco. That advertisement of a lawful business is legitimate and requisite to successfully carry it on and is a necessary incident thereto, may also not well be disputed. If a business is legitimate and permitted to be carried on by legislative sanction, I do not well see by what authority the legislature may prevent proper and legitimate advertisement of it, any more than it may prevent the making of contracts in connection with or in relation to the business. Here, the legislature has said that the only permissible method of advertising tobacco is in newspapers, magazines and periodicals not only published and circulated among the several states, but also those published and circulated wholly within the state, and wherein may be displayed all kinds of alluring and attractive advertisements thereof. Nor are advertisements of tobacco forbidden by radio or by distribution of handbills or circulars on the street or from door to door of households nor by any other method, except by billboards and other similar displays. Such permitted methods of advertisements of tobacco are not regarded as inimical to public health, morals or general welfare; but when the modest advertisement, "Chesterfield Cigarettes, they satisfy", is displayed on a billboard, it is feared that the morals or health of the youths of the state are likely to be injuriously affected, and the youths caused or induced to procure tobacco and cigarettes, but for which kind of advertisement they would not be able or are less likely to procure them.

It is argued that the Act of 1923 is regulatory and indicates a general policy of the state to restrict the sale and use of tobacco, especially of cigarettes. A careful, even a cursory, reading of the Act shows that it is and was intended to be a mere revenue measure. By the Act no tax or license is imposed nor is any permit required to sell or to engage in the business of selling or dealing in tobacco in any form, except cigarettes. But the requirement of an annual license fee of from $100 to $25, and a tax on each cigarette and on cigarette papers, to sell cigarettes and cigarette papers, clearly is a revenue and not a police measure. The general rule is, and as stated in 37 C. J. 170, that where a fee is exacted primarily for revenue purposes, and payment of it gives the right to carry on a business or occupation without the performance of any more conditions, it is not a license fee, but a tax imposed, regardless of the name by which it may be called. The business or sale of the commodity which is the subject of the license and tax being itself lawful and sanctioned, the permit granted is but a convenient method of assessing and collecting the tax. 1 Cooley on Taxation, 4th Ed., 407; Royall v. State of Virginia, 116 U. S. 572; Waters-Pierce Oil Company v. City of Hot Springs, 85 Ark. 509, 109 S. W. 293, 16 L. R. A. (N. S.) 1035; City of Portland v. Portland Gas & Coke Company, 80 Ore. 194, 150 Pac. 273, 156 Pac. 1070; Ex parte Mayes, 64 Okla. 260, 167 Pac. 749; State ex rel. Wyatt v. Ashbrook, 154 Mo. 375, 55 S. W. 627. And to that effect is the case of Matthews v. Jensen, 21 Utah 207, 61 Pac. 303, and the recent case of Best Foods Company v. Christensen, ... Utah ....., 285 Pac. 1001 where numerous cases are referred to in support thereof.

When thus the permit is had and the so-called license fee and tax paid, the business of selling cigarettes and cigarette papers is just as lawful and with just as much legal sanction, as is the selling of any other form of tobacco. By the Act the business itself in no particular is regulated. It does not even pretend to have any such purpose. There is no language in the Act from which such a purpose may even be inferred or implied. It does not regulate or control anything, nor pretend to do so. As to that, it may here be said as was said by the court in the case of Ex parte Mayes, 64 Okla. 260, 157 Pac. 749, that

> "The statute does not purport to have in mind a regulation. It imposes no conditions, and contains no restrictions for the carrying on of the business; neither does it attempt to regulate or control those lawfully engaging in the business. Its primary and, indeed, only purpose is to authorize the collection of a tax."

We thus are brought back to the proposition, and to the real question in hand, as to whether it was competent for the legislature in the exercise of the police power, to curtail or prevent advertisements of a commodity or of a lawful business, especially to forbid advertisements by a particular method not itself obnoxious or inimical to public morals or general welfare, and at the same time permit ad libitum all sorts of alluring and attractive advertisements of the same article or commodity by various other methods. Let it be assumed that where in the legitimate exercise of the police power the manufacture or sale of, or traffic in, an article or commodity the carrying on of a business, has been prohibited, it also is within the police power to prohibit or prevent advertisements of such commodities or business. But as is seen, that is not the situation here. The legislature has not

prevented nor did it attempt to prevent the advertisement of tobacco. The prohibitions go merely to the particular method or medium of advertisement, advertisements on billboards, etc. The medium or method of billboard advertisement as is common knowledge has become general and without any legislative restriction of the state is permitted and is extensively employed as to advertisements of all other kinds of articles and commodities of merchandise. Not anything is made to appear or even suggested that displaying advertisements on billboards is obnoxious or inimical to public morals or public welfare, any more than is the publication and circulation of the same kind of advertisement in a newspaper, magazine or periodical or by any other method. If the one is obnoxious and inimical to public morals, etc., so would it seem must also be the other,

The law is well settled that the operation of a statute must be determined from the natural and legal effect of the language employed, and whether the statute is or is not repugnant to constitutional provisions, either state or federal, must be determined from its natural effect when put in operation and not from its proclaimed or asserted purpose. What is meant by, and when an act may be upheld on the theory of police power, is well stated in 22 Am. & Eng. Ency. of Law 938 as follows:

> "In order that a statute or ordinance may be sustained as an exercise of the police power, the courts must be able to see (1) that the enactment has for its object the prevention of some offense or manifest evil for the preservation of the public health, safety, morals or general welfare, and (2) that there is some clear, real and substantial connection between the assumed purpose of the enactment and the actual provisions thereof, and that the latter do in some plain,

appreciable and appropriate manner tend towards the accomplishment of the object for which the power is exercised. The police power cannot be used as a cloak for the invasion of personal rights or private property, neither can it be exercised for private purposes or for the exclusive benefit of particular individuals or classes."

The propositions also are well put in 6 R. C. L. 237 that,

> "In order to sustain legislative interference by virtue of the police power, under either a statute or a municipal ordinance, it is necessary that the act should have some reasonable relation to the subjects included in such power, and the law must tend, in a degree that is perceptible and clear, toward the preservation of the public welfare, or toward the prevention of some offense or manifest evil, or to the furtherence of some object within the scope of the police power. The mere assertion by the legislature that a statute relates to the public health, safety or welfare does not in itself bring that statute within the police power of a state; for there must be obvious and real connection between the actual provisions of a police regulation and its avowed purpose, and the regulation adopted must be reasonably adapted to accomplish the end sought to be attained. One application of the familiar rule that the validity of an act is to be determined by its practical operation and effect and not by its title or declared purpose is that a constitutional right cannot be abridged by legislation under the guise of police regulation; since the legislature has no power, under the guise of police regulations, to invade arbitrarily the personal rights and personal liberty of the individual citizen, or arbitrarily to interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations, or to invade property rights."

To the same effect also is 12 C. J. 929. Many cases, both federal and state, are cited which fully support the texts. Special reference, however, may be made to the cases of

Lochner v. New York, 198 U. S. 45; State ex rel v. Ashbrook, 154 Mo. 375, 48 L. R. A. 265; and State v. Redmon, 134 Wis. 89, 114 N. W. 137, 14 L. R. A. (N. S.) 229, 126 Am. St. Rep. 1003, 15 Ann. Cas. 408.

Just as well is it settled that however broad and comprehensive the police power of the state may be, the exercise of the power, nevertheless, is not without limitations, and that the legislature in the exercise of the power may not transgress or infringe upon either state or federal constitutional provisions. Logan City v. Public Utilities Comm., ... Utah ....., 271 Pac. 961; Sol. Block & Griff v. Schwartz, 27 Utah 387, 76 Pac. 22, 12 C. J. 928, 6 R. C. L. 195.

So, too, is it well settled that whether the police power has been exercised within proper limitations, whether or not the act is a reasonable exercise thereof, whether a particular measure is designed to further some governmental function and bears some reasonable, obvious or direct relation to the purpose sought to be accomplished, are all judicial questions. 6 R. C. L. 242 and cases there cited.

Such propositions may not and are not disputed, but here are shaded and minimized and not given proper force or effect. Timely observations were made by Mr. Justice Marshall in State v. Redmon, supra. Among other things he says:

> "Doubtless the fathers of the constitution foresaw the likelihood and danger of the security of personal rights, which the fundamental law was intended to firmly entrench with the judiciary as its efficient defender, being jeopardized at times by exeessive regulation of the ordinary affairs of life, * * *. The idea is found expressed now and then, that the police power is something not dealt with or affected by the constitution, at least in any marked degree, which is

a mistake hardly excusable. The error suggested here and there, that the police power is 'a sovereign power in the state, to be exercised by the legislature, which is outside and in a sense above the constitution (Donnelly v. Decker, 58 Wis. 461, 17 N. W. 389) or that a police regulation which is clearly a violation of express constitutional inhibition is legitimate, subject to a judicial test as to reasonableness * * * (Tiedeman, State & Federal Control, Sec. 3), or that no police regulation, not condemned by some express constitutional prohibition, is illegitimate, or that legislation not so condemned is legitimate if the law-making power so wills, though it violates some fundamental principles of justice, or that the reasonableness of a police regulation, and whether it unjustly deprives the citizen of natural rights, is wholly of legislative concern (Hedderich v. State, 101 Ind. 564, 1 N. E. 47) and others of a similar character now and then found in legal opinions and text-books, are highly misleading' and have been distinctly discarded by this court. State ex rel Milwaukee Med. Coll. v. Chittenden, 127 Wis. 468, 107 N. W. 500. * * *, if it were true that all police regulations are legitimate which are reasonable, and all are reasonable which the legislature so wills, the constitution as to very much of the field of civil government would be of no use whatever. The contrary has been the rule without any legitimate question since Marbury v. Madison, 1 Cranch 137. * * *. The idea that all legislation is within the police power which the law-making authority determines to be so, and that all which might be within such power is within it if the legislature so determines, is, as we have seen, a heresay and one which was repudiated sufficiently for all time by the early decision heretofore referred to, in Marbury v. Madison, supra, the American classic which first and conclusively defined the general character of the constitutional limitations and the relations of the legislature and the judiciary thereto and to each other. The doctrine there laid down more than a century ago in the unanswerable logic of Chief Justice Marshall has never been departed from, except accidently, inconsiderately, or ignorantly."

In Mugler v. Kansas, 123 U. S. 623, Mr. Justice Harlan said:

> "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution."

In the case of Ex parte Jentzsch, 112 Cal. 468, 44 Pac. 803, the California court, among other things, said:

> "So, while the police power is one whose proper use makes most potently for good, in its undefined scope and inordinate exercise lurks no small danger to the republic. For the difficulty which is experienced in defining its just limits and bounds affords a temptation to the legislature to encroach upon the rights of citizens with experimental laws, none the less dangerous because well meant."

In the case of Boyd v. U. S., 116 U. S. 616, Mr. Justice Bradley said:

> "Constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the rights, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be 'Obsta principiis.'"

The claim made by the state and adopted in the prevailing opinion in effect is that since the sale of tobacco to a minor under 21 years is prohibited, the act in question forbidding advertisements of tobacco on billboards is a legitimate exercise of the police power as tending to prevent or lessen sales of tobacco to minors, especially cigarettes, and to prevent or lessen the use of tobacco by minors as well as by adults. That is to say, as is claimed, preventing advertisements of tobacco on billboards, in street cars or on placards, will cause or induce dealers not to sell or furnish tobacco to minors, cause or induce minors not to buy or use tobacco and and will lessen the use thereof by both minors and adults; and that an advertisement of tobacco on billboards, etc. will suggest to minors and to adults a desire to use tobacco which otherwise would not be suggested to them if such advertisements were not permitted on billboards and that advertisements of tobacco, including cigarettes, in newspapers, magazines and periodicals or by other permitted methods of advertisements thereof, have no such tendency. In other words as is claimed, to protect the youth of the state against the use of tobacco and to prevent or lessen the use thereof by adults as well, the legislature permitted ad libitum all kinds of alluring and attractive advertisements of tobacco in newspapers, magazines and periodicals whether printed and circulated wholly within the state, or among the several states, and permitted all other methods of advertisements of tobacco, except on billboards, street cars, placards or on other objects of display. And on such theory is the claim made that the section of the statute under consideration and forbidding advertisements of tobacco on billboards, etc., has for its object the prevention of a manifest evil and the preservation of public health, morals, and general welfare, and bears a real

and direct relation between such purpose of the enactment and the accomplishment of the claimed and asserted object or end. To support that, the state cites numerous authorities:

Merrick v. N. W. Halsey & Co., 242 U. S. 568, and Hall v. Grenger-Jones Co., 242 U. S. 539, cases involving the validity of the so-called blue sky law regulating sales and dealings in corporate stocks and other securities to protect investors against fraud, etc.; in Re Fred Oberg, 21 Ore. 406, 28 Pac. 130, 14 L. R. A. 577, involving the validity of a statute providing that no officer or seaman of a sea-going vessel or ship should be arrested or imprisoned for debt, which act applied to all sailors of sea-going vessels or ships and entitled all under the same circumstances and conditions to enjoy the granted privilege and immunity; Soon Hing v. Crowley, 113 U. S. 703, involving the validity of an ordinance prohibiting washing and ironing in public laundries and washhouses within restricted territorial limits, from ten o'clock at night to six o'clock in the morning, being an ordinance adopted to regulate the establishment and maintenance of public laundries and washhouses, to make inspections by health officers and boards of fire wardens as to conditions with respect to stoves, drying apparatus, and appliances for heating smoothing irons, so as to guard against dangers to surrounding property from fire, and to inspect premises in which it is proposed to carry on the business; Halter v. Nebraska, 205 U. S. 34, where the validity of a statute was upheld preventing desecrations of the flag of the United States and the use of the flag for advertising purposes, etc., the doing of which things, said the court, discredited and cheapened the flag in the estimation of the public and defeated the maintenance of it as an emblem of National Power and National

Honor; N. Y. N. H. & H. R. R. v. New York, 165 U. S. 628, involving a statute regulating the heating of steam passenger cars and directing guards to be placed on railroad bridges and approaches thereto; Powell v. Pennsylvania, 127 U. S. 678, involving an act regulating the manufacture and sale of products in imitation of butter and cheese and preventing adulterations of butter, cheese, and other dairy products; Fisher v. St. Louis, 194 U. S. 367, involving a municipal ordinance prohibiting the erection of any barn or cow stable within the city limits without permission from the municipal authorities and prescribing conditions and circumstances under which such a permit may be had; Lieberman v. Van De Car, 199 U. S. 552, involving an ordinance regulating the sale and distribution of milk in the City of New York under the supervision of and upon conditions imposed by the Public Board of Health; Mun v. Illinois, 94 U. S. 113; Budd v. New York, 143 U. S. 517, Brass v. Stoesser, 153 U. S. 391 and W. W. Carghill Co. v. Minnesota, 180 U. S. 452, cases involving acts regulating public warehouses and warehousing and inspecting, weighing and handling of grain, etc.; Whyte v. City of Sacramento, 65 Cal. Ap. 534, 244 Pac. 1008, involving an ordinance relating to the use of trucks over a certain weight on streets in designated districts; and Mack v. Westbrook, 148 Ga. 690, 98 S. E. 339, involving an act providing for the condemnation of vehicles and other conveyances used on public or private highways in conveying liquors and intoxicating beverages the sale or possession of which was by law prohibited.

In all such cases the ordinance or act in question was upheld as a proper and legitimate exercise of the police power and not as transgressing any constitutional provision. Many of them relate to matters of mere regulation. Hundreds of

other cases could be cited where similar rulings were made. But in all the cited cases, the ordinance or act called in question, by the natural and legal effect of its language, had for its object the prevention of some offense or evil, or the preservation of public health or public morals or general welfare, and had an obvious, or real, or direct relation to, and in some plain, definite and tangible degree tended toward, the accomplishment of the object or purpose for which the police power was exercised.

Because such a relation was so shown in such cases, it does not follow that an obvious or direct relation also is shown in the case in hand, or in other cases of different facts or enactments. Every decision or opinion is dependent upon the facts upon which it is founded and must be considered in view of, and may not without reference to them, be indiscriminately applied to cases of dissimilar facts or enactments. As has been seen, the operation of the statute must be determined from the natural and legal effect of the language employed and whether the act as a police measure is designed to further some governmental function and as to whether it bears some real or direct relation to the purpose sought to be accomplished, are as the text and cases teach judicial questions. Here, no such relation from the language or operation of the act appears.

It in effect is argued that the subject-matter of the act relates to the sale, use and advertisement of tobacco, including cigarettes, and to restrict the sale and use of tobacco. The argument, as I think, is not supported by the act, as a reading of it will clearly show. By it the sale of tobacco to minors is prohibited. But there is no restriction or regulation whatever as to carrying on the business of selling or dealing in or using

tobacco. True, a license fee and tax is exacted to sell cigarettes and cigarette papers, but that, as has been seen, is for revenue and not for regulation of the business or in carrying it on, and from which the state derives an annual revenue of $200,000.00 or more. Upon paying the tax and obtaining the permit a dealer is as free to sell cigarettes to adults as he is to sell tobacco in all other forms, without any restriction or regulation whatever, and to the same extent that he is privileged to sell and deal in any other commodity or article of merchandise. And further, as has been seen, the act does not forbid advertisemnts of tobacco including cigarettes. And since selling and dealing in tobacco is a lawful business and the use of tobacco, not even by minors, restricted or forbidden, and since advertising is a necessary incident to carrying on the business, it would seem somewhat anomalous legislation, if the legislature had attempted to forbid all advertisements of tobacco. What the legislature did is to permit advertisements of all kinds of tobacco, including cigarettes, except on billboards and on other similar objects of display. What it thus did is to strike at and banish bill board and other similar methods of advertisements, in no sense and not claimed to be an obnoxious or improper method of advertising, while permitting without restriction advertisements of tobacco by all other methods.

It also is argued that advertisements on billboards are attractive and tend to increase sales of the commodity so advertised. Let it be assumed such advertisements are attractive and increase sales of the commodity advertised. Such is the purpose of all advertisements by calling attention to the article or commodity advertised, its description and quality, and place where it may be had. Certainly the legislature may

not require one merchant or dealer in a lawful commodity or business to hide his advertisement under a bushel, while others are permitted to display them on the housetop. A method of advertisement, not obnoxious in and of itself, is not to be banished because it may be an attractive and effectual method. Further the prohibition to advertise on billboards does not apply to all persons. It applies only to those engaged in selling or dealing in tobacco, a business as lawful as any other business. It applies to no one else engaged in any other kind of business. As well say that all those engaged in the automobile business may not advertise their business on billboards while all other kinds of business may be so advertised.

It also is argued that the use of tobacco is by some regarded as injurious to health. But the legislature has not as yet forbidden the sale or use of it. Some may regard the sale and use of coca cola, or of tea or of coffee injurious to health. Until the legislature forbids or restricts the sale or use of them, I do not well see how it may declare that any of these may not be advertised on billboards, while permitting them to be advertised by all other methods, and at the same time permit all other articles or commodities of merchandise of a lawful business to be advertised on billboards.

Because the legislature may not control advertisements in newspapers, magazines and periodicals circulating among the several states, it is asserted such restriction does not prevent it from forbidding advertisements on billboards wholly within the state. In the first place the act permits advertisements of tobacco in newspapers, magazines and periodicals, not only those circulating among the several states, but also those printed and circulated wholly within the state. In the next

place, the suggestion is not unlike what a noted humorist once said, that if one is unable to "lick" another who had given offense, then flog his child, or throw a stone at his dog across the street. If it be incompetent for the legislature to forbid advertisements in newspapers, magazines and periodicals, then I do not well see on what theory it may forbid advertisements by some other legitimate method not itself obnoxious or inimical to public morals or general welfare, without creating an unwarranted discrimination, and denying equal rights and privileges; and especially, when the method is forbidden only as to a particular commodity or article of merchandise of a lawful business, and at the same time permitted as to all other articles or commodities of merchandise. In other words if one method of advertising in the state by citizens outside the state is required and granted, then it is difficult to see on what theory citizens of the state may be denied another method or methods of advertising in no sense obnoxious to public morals or general welfare, and equally legitimate and proper as the method granted to and permitted by citizens outside the state, without denying to citizens within the state, not as to mere form but as to substance and essence, the same rights and privileges granted to citizens outside the state.

Then further, I do not see, nor in what way it is even indirectly shown, that since it is unlawful for any one to sell or furnish tobacco in any form to a minor, wherein an advertisement of tobacco displayed on a billboard will more readily enable a minor to obtain or use tobacco, or by preventing such method of advertisements will render it more difficult for him to obtain it, or protect him against the use of it, when at the same time, all sorts of alluring and attrac-

tive advertisements of tobacco may be and are had in newspapers, magazines or periodicals, and all other methods of advertisements.

The suggestion that advertisements on billboards are more readily seen or "forced" on public attention than advertisements in newspapers, magazines or periodicals or that the one is thrust on the public while the other to be seen must be sought for, and for such reason the one method is more effectual and impressive than the other or others, is, as I think, without merit, and is refuted by common knowledge and observation that numerous newspapers, magazines and periodicals of all kinds carrying in prominent and conspicuous places all sorts of richly designed and attractive and alluring advertisements of tobacco and displayed in attractive colors and pictures, find their way in about every household in the state and are or may be seen and noticed by about every member of the family able to read, and many of them distributed and delivered by minors. That billboard advertisements may be regarded as more attractive and effectual than advertisements in newspapers and magazines, or by radio, no doubt would stoutly be disputed by newspapers and magazine publishers and by radio advertisers. Though billboard advertisements may be regarded as attractive and effectual methods of advertising, yet, since such method is not obnoxious or inimical to public morals or general welfare, that does not justify banishing billboard advertisements of an article or commodity of merchandise of a lawful business. Nor do I see any basis for the contention that permitting advertisements of tobacco on billboards tends to induce dealers or others, in violation of the statute forbidding it, to sell or furnish tobacco to minors, or that preventing such

method of advertising tends to restrain or prevent minors from obtaining or using tobacco. At least such a relation or connection in no sense is obvious or direct, and at most is but extremely remote. If it be thought wise and necessary to prohibit or restrain a minor from the use of tobacco, or to protect him against its use, let some proper legislation be had which by some direct or appropriate manner tends to accomplish such end or purpose, and not by banishing billboard advertisements of tobacco, while at the same time permitting all sorts of advertisements thereof by all kinds of other methods.

We have a statute which forbids a minor under a prescribed age from operating a motor vehicle on a public highway or thoroughfare. In some jurisdictions dealers and others are also forbidden from selling or entrusting a motor vehicle to a minor under a prescribed age and which knowingly is to be used and operated by the minor on a public street or thoroughfare. In such case it may not successfully be asserted that it is competent for the legislature to forbid advertisements of automobiles on billboards while at the same time permitting all sorts of advertisements of them in newspapers, magazines and periodicals, on the theory that preventing advertisements on billboards tends to prevent a minor under the prescribed age from operating a motor vehicle on a public street or thoroughfare or others from entrusting a motor vehicle to him. No one would contend that, yet in principle the presence of any real, direct or obvious relation between the thing prevented and the claimed object sought to be accomplished is as wanting in the one case as in the other. In each, the asserted relation has neither substance nor even shadow to support it, and is based on mere

fancy and vagary. Nor, may the analogy be denied on the theory that in the one the subject, the use of tobacco, may be regarded as pernicious and injurious, while in the other, a motor vehicle is not itself harmful or dangerous or fraught with evil consequences. While a motor vehicle may not in and of itself be so regarded, yet, in the hands of a youth or other immature or inexperienced person operating it, a motor vehicle on a public street or thoroughfare is highly dangerous and a menace, not only to such a person operating it, but also to the safety of the public; and on such theory, minors under a prescribed age by legislative enactments are forbidden operating motor vehicles on public streets.

But further as to this. Selling tobacco in all its forms including cigarettes to adults without restriction is lawful and expressly permitted by legislative sanction. Since a dealer may thus lawfully engage therein, he, by proper advertisement may make known the kind and quality of his goods and the place where they may be had. To deny him that right is in effect, or to a large extent, to deny him the benefit or enjoyment of the property right granted him of carrying on the business permitted to be carried on by him. Why should he thus be deprived by proper advertising from making known to those who without restriction may lawfully purchase and use them, the kind and quality of his goods and the place where they may be had, because the method not harmful or obnoxious in and of itself and chosen by him is attractive and effectual and tends to increase his business? The question may not be answered by the assertion that the use of tobacco by some is thought to be a public evil and a menace to public health and morals, for such an answer or claim is completely refuted by the legislative act itself which

permits all kinds of methods of advertisement of tobacco and prevents none, except on billboards and other similar objects of display, and by the legislative will of the state legalizing and permitting the sale of tobacco in all forms to adults, and without restriction permitting the use of it by them as well as by minors, except that a proprietor may not permit a minor to frequent his place of business while *the minor is in the act of using tobacco in any form.*

I thus see no obvious or real or direct relation or connection between the assumed or asserted purpose of section 2 of the act and the provisions thereof, or wherein the latter in any plain or appreciable manner tends towards the accomplishment of the object for which it is claimed the police power was exercised, preventing advertisements of tobacco on billboards.

In Meyer v. Nebraska, 262 U. S. 390; Bartels v. Iowa and in Bohning v. Ohio, 262 U. S. 404, the validity of statutes forbidding the teaching of modern foreign languages in educational institutions was called in question and where thereunder teachers were proceeded against for teaching the German language in such institutions. The state courts held the acts constitutional on the theory that teaching such languages, especially the German language, tended to inculcate in the minds of the youth systems or principles of government hostile or inapplicable to our institutions and before the youth had been sufficiently taught the principles of our own government and tended to inculcate ideas and sentiments foreign to the best interests of our country; that as the English language is the prevailing National language of this country, no other language, or subject not in the English

language, should be taught, and that to do so was inimical to civic development and public good. The acts, by the Supreme Court of the United States, were held unconstitutional and as having no such asserted relation or any real or obvious relation to anything within the legitimate scope of the police power.

In George v. City of Portland, 114 Ore. 418, 235 Pac. 681, the case involved an ordinance which provided that no license to engage in a soft drink business should be issued to any person not a citizen of the United States. It was there urged that the purpose of the ordinance was to further the enforcement of laws prohibiting traffic in alcoholic and intoxicating liquors. The Supreme Court of the State in effect held that no such purpose was real or obvious, that non-intoxicating beverages had not been outlawed, and that the right to contract concerning them and to buy, sell, and possess them was within the protection of constitutional provisions which were infringed upon by a unreasonable and unwarranted exercise of the police power. Cases are in great number involving a variety of subjects where enactments were held invalid because there was no direct or real relation between the means employed and the object or purpose sought to be accomplished within the scope of the exercise of the police power.

The principles announced in Lochner v. New York, supra, may here again be noticed, that mere assertions that a subject relates though but in a remote degree to the scope of the police power, does not render the enactment valid, and that the act must have a more direct relation, as a means to an end, and that the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes

with the general right of an individual to be free in his person and in his power to contract and in his enjoyment of property and property rights.

In the case of Little v. Smith, 124 Kans. 237, 257 Pac. 959, the court had under consideration a statute which made it unlawful to advertise cigarettes or cigarette papers in a newspaper or other periodical "published, offered for sale or for free distribution within the state of Kansas", or to advertise cigarettes or cigarette papers on any street sign or billboard or otherwise. In holding the act invalid the court with respect thereto among other things said:

> "While the police power is wide in its scope and gives the Legislature broad power to enact laws to promote the health, morals, security and welfare of the people, and, further, that a large discretion is vested in it to determine for itself what is deleterious to health, morals, or is inimical to public welfare, it cannot under the guise of the police power enact unequal, unreasonable and oppressive legislation, or that which is in violation of the fundamental law. The statute in question supplanted and repealed one prohibiting the sale and disposal of cigarettes and which had been theretofore held valid. The later act authorized the sale of these except to minors. This act treates cigarettes as articles of commerce, and it is essentially an act to raise revenue. It is competent for the Legislature to include in an act provisions for regulation as well as for raising revenue, if its provisions do not violate constitutional limitations. It is readily apparent that the dominant theory of the act is to provide revenue. It is stated, and seems to be conceded, that the revenue raised under the act will amount to at least one million dollars each year. Having legalized the sale of cigarettes, thus making them articles of commerce, can the legislature restrict the making of contracts for advertising, which operates unequally as between publishers engaged in that busi-

ness. It is conceded that the act is ineffective as against publishers outside of the state, whose newspapers and publications have a much larger circulation than those issued by the plaintiffs and other publishers within the state. Because of this condition it may well be doubted whether the restriction as to advertising can have any appreciable effect in preventing sales to minors where outside publications, which go into almost every household, carry full page advertisements of cigarettes, or whether the restriction on local publishers contributes in any substantial degree towards accomplishing the avowed purpose of promoting the public welfare. A statute restraining the liberties and property rights of citizens cannot be upheld unless it has a real relation to its object and the regulation reasonably adapted to accomplish the end sought to be attained. Marbury v. Madison, 1 Cranch 137, 2 L. Ed. 60. Whether the act is open to that objection need not be determined, but it is clear that in its operation it is unequal and obviously discriminatory. Here we have an act which in its operation permits publishers on one side of the state line to contract for advertising articles of commerce, but prohibits publishers on the other side of the state line from making like contracts. We think it offends the constitutional provision that 'the citizens of each state shall be entitled to all privileges and immunities of citizens of the several states.' Sec. 2, Art. 4, Federal Constitution. It is obnoxious also to the due process of the Fourteenth Amendment of that Constitution and to other clauses that no state shall deny any person within its jurisdiction the equal protection of the law."

For the same, if not for stronger reasons should the act here be held an infringement on such constitutional rights and as being discriminatory, since the act forbids a particular, proper and lawful method or medium of advertising of a lawful business and of a lawful article of trade, while permitting the same kind of advertisement in newspapers,

magazines and periodicals, and by the same method or medium of billboard advertising permitting all kinds of advertisements of all other kinds of articles or commodities of merchandise or commerce, thereby withholding and denying rights and privileges of citizens of the state which are granted to other citizens both within and outside the state, and denying to citizens within the jurisdiction of the state equal protection of the law.

Thus, since tobacco has not been outlawed, and to engage in buying and selling it is a lawful business, and since advertisement thereof is a necessary incident thereto, an act, preventing advertisement of tobacco by a particular and lawful method or medium, not itself obnoxious or harmful, while permitting advertisements of all other articles of merchandise by the same method, and permitting tobacco in all its forms to be advertised by all other methods, except by billboards, etc., is an unreasonable and arbitrary exercise of the police power, creates an unwarranted discrimination; abridges the right to contract concerning a lawful business and the right to acquire, possess and enjoy property, in effect amounts to a deprivation of property without due process of law, and is a denial of the equal protection of the law and of privileges and immunities of citizens safeguarded and protected by constitutional provision.

I think the judgment of the court below should therefore be affirmed.

* * * * * *

ELIAS HANSEN, J.

I concur in the views expressed by Mr. Justice Straup in his dissenting opinion.

APPENDIX II.

CHAPTER 52 (Laws of Utah, 1923).

LICENSING AND SALE OF CIGARETTES, ETC.—ADVERTISING TOBACCO, CIGARS, CIGARETTES, ETC.—SMOKING ROOMS.

AN ACT AMENDING SECTIONS 1, 2 AND 4, RE-ENACTING SECTIONS 3 AND 5, CHAPTER 145, LAWS OF UTAH, 1921, SO AS TO MAKE IT UNLAWFUL TO BARTER, SELL OR OFFER FOR SALE CIGARETTES OR CIGARETTE PAPERS IN THE STATE OF UTAH WITHOUT A PERMIT; PROVIDING FOR THE GRANTING, ISSUANCE AND REVOCATIQN OF PERMITS THEREFOR, FIXING THE LICENSE FFES FOR SUCH PERMITS AND REQUIRING A BOND AS A CONDITION TO THE ISSUANCE THEREOF; PROVIDING FOR A STAMP TAX AND STAMPS ON ALL CIGARETTES, CIGARETTE PAPERS AND WRAPPERS AND TUBES SOLD IN THE STATE OF UTAH; DECLARING UNLAWFUL THE MAKING, ALTERING, FORGING OR COUNTERFEITING OF ANY SUCH LICENSE OR STAMP, OR HAVING POSSESSION THEREOF, KNOWING THE SAME TO BE FORGED, COUNTERFEITED, SPURIOUS OR ALTERED; PROHIBITING THE FURNISHING OF CIGARETTES OR CIGARETTE PAPERS OR WRAPPERS OR TOBACCO TO MINORS; DECLARING TO BE A NUISANCE ANY BUILDING OR PLACE USED FOR THE SALE OR KEEPING FOR SALE OF CIGARETTES, OR CIGARETTE PAPERS OR WRAPPERS IN VIOLATION OF THE PROVISIONS OF THIS ACT; PROHIBITING THE ADVERTISING OF CIGARETTES, CIGARETTE PAPERS, CIGARS, CHEWING TOBACCO OR SMOKING TOBACCO, EXCEPT AS PROVIDED HEREIN; PROHIBITING SMOKING IN CERTAIN PUBLIC PLACES AND FORBIDDING PROPRIETORS KNOWINGLY TO PERMIT MINORS TO SMOKE TOBACCO IN THEIR PLACE OF BUSINESS; PROVIDING PENALTIES FOR THE VIOLATIONS OF THE PROVISIONS OF THIS ACT, AND REPEALING ALL ACTS OR PARTS OF ACTS IN CONFLICT WITH THE PROVISIONS OF THIS ACT.

Be it enacted by the Legislature of the State of Utah:

SECTION 1. *Sections amended or re-enacted.* That Sections 1, 2 and 4, Chapter 145, Laws of Utah, 1921, be amended

as hereinafter set forth, and that Sections 3 and 5 of said chapter be re-enacted.

Sec. 1. *Permit for sale of cigarettes and cigarette papers —license—bond—fraud—penalties—tax stamps—enforcement—minors—nuisance.* It shall be unlawful for any person, firm or corporation to barter, sell or offer for sale, cigarettes or cigarette papers in the State of Utah, without first having obtained a permit therefor, which said permit may be granted and issued by the board of city commissioners of any city of the first or second class, the city council of any city of the third class, the board of trustees of any town, or the board of county commissioners in any territory outside of any city or town. Said permit shall be in force and effect for one year from and after the date of issuance, unless sooner revoked, and shall be granted only to a person, firm or corporation owning or operating the place from which such sales are to be made, which place shall be within the territorial limits of the body granting such permit. Each permit shall be numbered and shall show the residence and place of business of the permit holder, and shall not be transferable. The body issuing such permit shall, on reasonable notice and hearing, revoke the permit of any person, firm or corporation violating any provision of this Act, and no permit can be issued to such person, firm or corporation within a period of two years thereafter. The body issuing such permits shall keep an accurate record thereof and of all revocations of permits, and upon revocation of any permit shall immediately certify the same to the State treasurer.

No permit shall be issued until the applicant shall have paid to the treasurer of the city, town or county, as the case may be, an annual license fee therefor as follows:

In cities of the first class	$100.00
In cities of the second class	75.00
In cities of the third class	50.00
In towns, or other territory	25.00

All such license fees shall be credited to the general fund of the city, town or county collecting the same.

No permit shall be issued until the applicant therefor shall have filed with the city recorder, or clerk of the body issuing said permit, a bond to be approved by the board of county commissioners, board of city commissioners, or city council, as the case may be, which said bond shall be payable to the city, town or county issuing such permit, for the benefit of all parties interested, and shall be in the amount of five hundred ($500.00) dollars and conditioned upon the faithful observance of all the provisions of this Act, and for the payment of all damages that may result from the unlawful sale of cigarettes or cigarette papers. Said bond shall be signed by the obligor as the principal and by a surety company authorized to do business in this State.

From and after the taking effect of this Act there is hereby imposed, and there shall be collected by and paid to the State treasurer, upon the sale of all cigarettes and cigarette papers, or wrappers and tubes sold in the State of Utah to consumers, the following taxes, to be paid at the time of sale and delivery to the consumer:

Class A. On cigarettes weighing not more than three pounds per thousand, one mill on each such cigarette;

Class B. On cigarettes weighing more than three pounds per thousand, two mills on each such cigarette;

Class C. On cigarette papers or wrappers or any papers made or prepared for the purpose of making cigarettes, made up in packages, books or sets; on each such package, book or set containing not more than fifty papers, one-half cent; containing more than fifty papers but not more than one hundred papers, one cent; containing more than 100 papers, one-half cent for each fifty papers or fractional part thereof.

Class D. On tubes, one cent for each fifty tubes or fractional part thereof.

All cigarettes sold in this State under the provisions of this Act shall be put up in packages containing 5, 8, 10, 12, 15, 16, 20, 24, 40, 50, 80 or 100 cigarettes each. Before being delivered to the consumer, each package of cigarettes and each package book or set of papers or of tubes, shall have securely affixed thereto a suitable stamp denoting the tax thereon, and said stamp shall be properly cancelled prior to such sale or removal for consumption, under such regulations as the State treasurer shall prescribe.

Any person, firm or corporation violating any provision of Section 1 of this Act shall be guilty of a misdemeanor; and all cigarettes, cigarette papers or wrappers, and papers made or prepared for the purpose of making cigarettes in his possession or in his place of business shall be confiscated and forfeited to the State.

It shall be unlawful for any person not authorized hereby, with the intent to defraud the State, to make, alter, forge or counterfeit any license or stamp provided for in this Act or to have in possession any forged, counterfeited, spurious or altered license or stamp, knowing the same to be forged, counterfeited, spurious or altered, and whoever is found guilty

of any violation of this provision shall be fined not more than one thousand ($1,000.00) dollars and be imprisoned in the State penitentiary not more than three years.

The State auditor shall prepare and have suitable stamps for use on each kind of package described herein. Upon requisition from the State treasurer, the State auditor shall deliver to his order the stamps designated in such requisition and shall charge the State treasurer with the stamps thus delivered, and shall keep an accurate record of all stamps coming into and leaving his hands. The State treasurer shall sell the stamps herein provided for, only to dealers holding permits issued as provided in this Act and the moneys received from the sale of such stamps shall be turned into the general fund of the State. The State treasurer shall redeem and make repayment for any unused stamps on written request made by any such dealer and pay for same out of any funds derived from the provisions of this Act. It shall be unlawful for a dealer to sell or dispose of such stamps to another dealer or to any person whomsoever, except as herein provided.

The State treasurer, in the enforcement of this Act, may call to his aid the attorney general, any county or district attorney or any peace officer, and he is further authorized to appoint such clerks and additional help as may be needed to carry out the provisions of this Act. The compensation of all persons employed hereunder shall be fixed by the State board of examiners and all necessary expenses shall be paid from the revenues derived hereunder.

Any person who shall furnish to any minor under twenty-one years of age, by gift, sale or otherwise, any cigarette or

cigarette paper or wrapper, or any paper made or prepared for the purpose of making cigarettes, or any tobacco of any kind whatsoever, shall be guilty of a misdemeanor, and shall be punished by fine of not less than twenty-five ($25.00) dollars, nor more than two hundred ninety-nine ($299.00) dollars, or by imprisonment in the county jail not exceeding six (6) months, or by both such fine and imprisonment.

Any person, firm or corporation maintaining a place where cigarettes or cigarette papers or tobacco are sold or kept with intent to sell in violation of the provisions of this Act, shall be deemed guilty of keeping and maintaining a nuisance, and the building or place so used for the sale or keeping for sale of cigarettes or cigarette papers or wrappers, or tobacco, in violation of the provisions of this Act, shall be deemed to be a nuisance, and such person, firm or corporation may be enjoined from maintaining such nuisance and such building or place abated as a nuisance, and the procedure for the actions to enjoin and abate such nuisance, or for contempt in violating an order of injunction, shall be, so far as applicable, the same as that now provided by the laws of this State enjoining and abating intoxicating liquor nuisances.

Sec. 2. *Advertising or display of tobacco, cigarettes, etc.* It shall be a misdemeanor for any person, company or corporation to write, print, publish, or circulate in any newspaper, magazine, periodical or circular written, printed or published within the State of Utah, or any street-sign, placard, or billboard, street-car, package of merchandise other than the merchandise licensed in this Act, or any other place of display, any advertisement of cigarettes or cigarette papers, cigars, chewing tobacco or smoking tobacco or any disguise or substitute of either of these except that a dealer in tobacco

and cigars may have a sign on the front of his place of business stating that he is dealing in such articles, and excepting further that cigars, chewing tobacco and smoking tobacco may be advertised in any newspaper published within the State of Utah, provided, however, that nothing herein shall be so construed as to permit advertising of cigarettes in any manner.

Nor shall any cigarettes or cigarette papers, or any advertisement thereof, be displayed in any store-window, in the State of Utah, provided however, that nothing in this section contained shall be construed so as to prohibit the display of tobacco and the advertisements thereof, other than cigarettes and the advertisements thereof, in store windows.

Sec. 3. *Use of tobacco, etc., by minors unlawful.* It shall be a misdemeanor for the proprietor of any place of business to knowingly permit minors under twenty-one years of age to frequent such place of business while in the act of using tobacco in any form. The term "place of business" as here used shall apply to any and all such places as shops, stores, factories, public garages, offices, theatres, recreation and dance halls, pool room, cafes, cafeterias, cabarets, restaurants, hotels, lodging houses, street cars, inter-urban and railway passenger coaches and waiting rooms.

Sec. 4. *Smoking tobacco, etc., in enclosed place, except in smoking rooms, forbidden—smoking signs.* It shall be a misdemeanor for any person to smoke cigars, cigarettes or tobacco in any form in any enclosed public place within the State of Utah, except in extra rooms, compartments or coaches specially provided for smoking purposes. The term "enclosed public place" as here used shall be construed to mean the din-

ing rooms in hotels, restaurants, cafes and cafeterias; theatres, passenger elevators, street cars, inter-urban and railway passenger coaches, motor and other passenger vehicles employed as common carriers, railway station waiting rooms, State, county and city buildings, excepting that the owner or proprietor of any hotel dining room, restaurant, cafe or cafeteria may designate the same as a public smoking room by a conspicuous sign at or near the entrance; provided further, that in any State, county or city building, any public officer who has a private office separate and apart from his public office, may if he so desires, designate such private office as a place where smoking may be permitted, and so long as such private office is so designated, smoking therein shall not be considered in violation of this Act.

Sec. 5. *"Unconstitutional" reservation.* If any section, subsections, clause, phrase or word of this Act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this Act.

Sec. 2. All Acts or parts of Acts in conflict herewith are hereby repealed.

Sec. 3. This Act shall take effect upon approval.

Approved March 8, 1923.

APPENDIX III.

CHAPTER 68 (Laws of Utah, 1925).

LICENSING AND SALE OF CIGARETTES, ETC.

AN ACT TO AMEND SECTION 1, CHAPTER 145, LAWS OF UTAH, 1921, AS AMENDED BY CHAPTER 52, LAWS OF UTAH, 1923, RELATING TO THE SALE OF CIGARETTES AND THE EXCISE TAX DERIVED THEREFROM.

Be it enacted by the Legislature of the State of Utah:

SECTION 1. *Section and chapter amended.* That Section 1, Chapter 145, Laws of Utah, 1921, as amended by Chapter 52, Laws of Utah, 1923, relating to the sale of cigarettes and the excise tax derived therefrom, be amended to read as follows:

Sec. 1. *Permit for sale of cigarettes and cigarette papers —revocations—license—bond—taxes—packing—stamp — records—penalties—fraud—enforcement—minors—nuisance.* It shall be unlawful for any person, firm or corporation to barter, sell or offer for sale, cigarettes or cigarette papers in the State of Utah, without first having obtained a permit therefor, which said permit may be granted and issued by the board of city commissioners of any city of the first or second class, the city council of any city of the third class, the board of trustees of any town, or the board of county commissioners in any territory of any city or town. Said permit shall be in force and effect for one year from and after the date of issuance, unless sooner revoked, and shall be granted only to a person, firm or corporation owning or operating the place from which such sales are to be made, which place shall be within the territorial limits of the body granting such permit.

Each permit shall be numbered and shall show the residence and place of business of the permit holder, and shall not be transferable. The body issuing such permit shall, on reasonable notice and hearing, revoke the permit of any person, firm or corporation violating any provision of this Act, and no permit can be issued to such person, firm or corporation within a period of two years thereafter. The body issuing such permits shall keep an accurate record thereof and of all revocations of permits, and upon revocation of any permit shall immediately certify the same to the State treasurer.

No permit shall be issued until the applicant shall have paid to the treasurer of the city, town or county, as the case may be, an annual license fee of ten ($10.00) dollars per year or fraction thereof. All such license fees shall be credited to the general fund of the city, town or county collecting the same.

No permit shall be issued until the applicant therefor shall have filed with the city recorder, or clerk of the body issuing said permit, a bond to be approved by the board of county commissioners, board of city commissioners, or city council as the case may be, which said bond shall be payable to the city, town or county issuing such permit for the benefit of all parties interested, and shall be in the amount of five hundred ($500.00) dollars and conditioned upon the faithful observance of all the provisions of this Act, and for the payment of all damages that may result from the unlawful sale of cigarettes or cigarette papers. Said bond shall be signed by the obligor as the principal and by two qualified sureties or by a surety company authorized to do business in this State.

From and after the taking effect of this Act there is hereby imposed, and there shall be collected by and paid to the State treasurer, upon the sale of all cigarettes and cigarette papers, or wrappers and tubes sold in the State of Utah to consumers, the following taxes, to be paid at the time of sale and delivery to the consumer:

Class A. On cigarettes weighing not more than three pounds per thousand, one mill on each such cigarette;

Class B. On cigarettes weighing more than three pounds per thousand, two mills on each such cigarette;

Class C. On cigarette papers or wrappers or any papers made or prepared for the purpose of making cigarettes, made up in packages, books or sets; on each such package, book or set containing not more than fifty papers, one-half cent; containing more than fifty papers but not more than one hundred papers, one cent; containing more than one hundred papers, one-half cent for each fifty papers or fractional part thereof;

Class D. On tubes, one cent for each fifty tubes or fractional part thereof.

All cigarettes sold in this State under the provisions of this Act, shall be put up in packages containing 5, 8, 10, 12, 15, 16, 20, 24, 40, 50, 80 or 100 cigarettes each. And whenever a carton of cigarettes is broken open, such carton shall be construed to be open stock and that all open stock of cigarettes or cigarette paper and each package, book or set of papers or of tubes, shall have securely affixed thereto a suitable stamp denoting the tax thereon, and said stamp shall be properly cancelled under such regulations as the State treasurer shall prescribe.

When a full carton of cigarettes is sold, the seal must be broken and the required amount of revenue stamps affixed to each separate package of cigarettes.

Every dealer of cigarettes and cigarette papers shall keep all surplus and open stock of cigarettes and cigarette papers in such form as may be prescribed by the State treasurer, and shall keep a record of all his purchases of cigarettes and cigarette papers. Such records to include invoices or bills of all such purchases and shall at all times during the business hours of the day be subject to inspection by the State treasurer or his deputies or such other officers as may be duly authorized by said State treasurer

Wholesalers, jobbers or distributors selling direct to consumers must comply with the provisions of this Act the same as other authorized dealers.

Any person, firm or corporation violating any provision of Section 1, of this Act shall be punished by a fine of not less than one hundred ($100.00) dollars, nor more than two hundred ninety-nine ($299.00) dollars. All fines collected to be credited 50 per cent to the general fund of the city, town or county collecting the same; and 50 per cent to be remitted to the State treasurer. Reports shall be made to the State treasurer of all fines so collected, on the last day of each month.

It shall be unlawful for any person not authorized hereby, with the intent to defraud the State, to make, alter, forge or counterfeit any license or stamp provided for in this Act or to have in possession any forged, counterfeited, spurious or altered license or stamp, knowing the same to be forged, counterfeited, spurious or altered, and whoever is found guilty of

any violation of this provision shall be fined not more than one thousand ($1,000.00) dollars and be imprisoned in the State pentitentiary not more than three years.

The State auditor shall prepare and have suitable stamps for use on each kind of package described herein. Upon requisition from the State treasurer, the State auditor shall deliver to his order the stamps designated in such requisition and shall charge the State treasurer with the stamps thus delivered, and shall keep an accurate record of all stamps coming into and leaving his hands. The State treasurer shall sell the stamps herein provided for, only to dealers holding permits issued as provided in this Act and the moneys received from the sale of such stamps shall be turned into the general fund of the State. The State treasurer shall redeem and make repayment for any unused stamps on written request made by any such dealer and pay for same out of any funds derived from the provisions of this Act. It shall be unlawful for a dealer to sell or dispose of such stamps to another dealer or to any person whomsoever, except wherever a person, firm or corporation owns more than one store, in such cases, stamps may be distributed in the various stores by the main office, but each store must have a separate permit and cancellation stamp.

The State treasurer, in the enforcement of this Act, may call to his aid the attorney general, any county or district attorney or any peace officer, and he is further authorized to appoint such clerks and additional help as may be needed to carry out the provisions of this Act. Provided that the legislature shall make the necessary budgeted appropriation to the State treasurer from the general fund to carry out the provisions of this chapter.

Any person who shall furnish to any minor under twenty-one years of age, by gift, sale or otherwise, any cigarette or cigarette paper or wrapper, or any paper made or prepared for the purpose of making cigarettes, or any tobacco of any kind whatsoever, shall be guilty of a misdemeanor, and shall be punished by fine of not less than twenty-five ($25.00) dollars, nor more than two hundred ninety-nine ($299.00) dollars, or by imprisonment in the county jail not exceeding six (6) months, or by both such fine and imprisonment.

Any person, firm or corporation maintaining a place where cigarettes or cigarette papers or tobacco are sold or kept with intent to sell in violation of the provisions of this Act, shall be deemed guilty of keeping and maintaining a nuisance, and the building or place so used for the sale or keeping for sale of cigarettes or papers or wrappers, or tobacco, in violation of the provisions of this Act, shall be deemed to be a nuisance, and such person, firm or corporation may be enjoined from maintaining such nuisance and such building or place may be abated, and the procedure for the actions to enjoin such nuisance, or for contempt in violating the order of injunction, shall be, so far as applicable, the same as that now provided by the laws of this State enjoining and abating intoxicating liquor nuisances.

Approved March 14, 1925.

APPENDIX IV.

CHAPTER 5.

(Special Session Laws of Utah, 1930).

SALE OF CIGARETTES AND CIGARETTE PAPERS.

AN ACT TO AMEND SECTION 1, CHAPTER 145, LAWS OF UTAH 1921, AS AMENDED BY CHAPTER 52, LAWS OF UTAH 1923, AS AMENDED BY CHAPTER 68, LAWS OF UTAH 1925, REGULATING THE SALE OF CIGARETTES AND CIGARETTE PAPER.

Be it enacted by the Legislature of the State of Utah:

SECTION 1. *Section amended.* Section 1, Chapter 145, Laws of Utah 1921, as amended by Chapter 52, Laws of Utah 1923, as amended by Chapter 68, Laws of Utah 1925, is hereby amended to read as follows:

SECTION 1. *Unlawful to sell without license—State treasurer to grant—time limit—to whom may be granted—license to show—power to revoke—who must comply—fees and conditions—stamps—unlawful when—penalty.* It shall be unlawful for any person to barter, sell or offer for sale, cigarettes or cigarette papers in this State, without first having obtained a license therefor, which said license may be granted and issued by the State treasurer and shall be in force and effect for one year from and after the date of issuance, unless sooner revoked. It shall be granted only to a person owning or operating the place from which such sales are to be made, which shall be within the territorial limits of the State of Utah. Each license shall be numbered and shall show the residence and place of business of the licensee, and shall not be transferable. The State treasurer shall, on reasonable notice and after hearing, revoke the license of any person violating any

provision of this Act, and no license can be issued to such person within a period of two years thereafter. Wholesalers, jobbers and distributors selling direct to consumers must comply with the provisions of this Act.

(a) No license shall be issued until the applicant shall have paid to the State treasurer an annual license fee of $10.00 per year or fraction thereof. All such license fees shall be credited to the general fund of the State.

(b) No license shall be issued until the applicant therefor shall have filed with the State treasurer a bond, to be approved by him, payable to the State of Utah for the benefit of all parties interested, in the amount of $500.00, and conditional upon the faithful observance of all the provisions of this Act, and for the payment of all damages that may result from the unlawful sale of cigarettes or cigarette papers. Said bond shall be executed by a surety company authorized to do business in this State.

(c) There is hereby imposed, and there shall be collected by and paid to the State Treasurer, upon the sale of all cigarettes and cigarette papers, or wrappers and tubes sold in this State to consumers, the following taxes:

Class A. On cigarettes weighing not more than three pounds per thousand, one mill on each such cigarette;

Class B. On cigarettes weighing more than three pounds per thousand, two mills on each such cigarette;

Class C. On cigarette papers or wrappers on any papers made or prepared for the purpose of making cigarettes, made up in packages, books or sets; on each such package,

book or set containing not more than fifty papers, one-half cent; containing more than fifty papers but not more than one hundred papers, one cent; containing more than one hundred papers, one-half cent for each fifty papers or fractional part thereof.

Class D. On tubes, one cent for each fifty paper tubes or fractional part thereof.

(d) All cigarettes sold in this State under the provisions of this Act shall be put in packages containing 5, 8, 10, 12, 15, 16, 20, 24, 40, 50, 80 or 100 cigarettes each, and whenever a carton of cigarettes or a box containing packages of cigarette papers is broken open, such carton of cigarettes or packages of cigarette papers shall be construed to be open stock, and all open stock of cigarettes or cigarette papers and each package, book or set of papers or of tubes shall have securely affixed thereto a suitable stamp denoting the tax thereon. Said stamp shall be properly cancelled under such regulations as the State treasurer shall prescribe, and it shall be unlawful for any dealer to fail to affix to each package of cigarettes or cigarette papers the stamp denoting the tax thereon as herein provided, or to have in his possession any open stock of cigarettes or cigarette papers without having affixed thereto revenue stamps as herein provided.

When a full carton of cigarettes or a box of cigarette papers is sold the seal must be broken open and the required amount of revenue stamps affixed to each separate package of cigarettes or cigarette papers therein.

(e) Every dealer in cigarettes or cigarette papers shall keep all surplus and open stock of cigarettes and cigarette

papers in such form as may be prescribed by the State treasurer, and shall keep a record of all his purchases of cigarettes and cigarette papers. Such records shall include invoices or bills of all such purchases and shall at all times during business hours be subject to inspection by the State treasurer or by any person duly authorized by him.

(f) Any person violating any provision of this Act other than subsections g and k shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than $100.00 nor more than $299.00 or by imprisonment not exceeding six months, or by both such fine and imprisonment. All fines collected to be credited 50 per cent to the general fund of the city, town or county collecting the same; and 50 per cent to be remitted to the State treasurer. Reports shall be made to the State treasurer of all fines so collected, on the last day of such month.

(g) It shall be unlawful for any person with the intent to defraud the State to make, alter, forge or counterfeit any license or stamp provided for in this Act or to have in possession any forged, counterfeited, spurious or altered license or stamp, knowing the same to be forged, counterfeited, spurious or altered, and whoever is found guilty of any violation of this sub-section shall be fined not more than $1,000 or be imprisoned in the State prison not more than three years or by both such fine and imprisonment.

(h) The State auditor shall prepare and have suitable stamps for use on each kind of package described herein. Upon requisition from the State treasurer the State auditor shall deliver to his order the stamps designated in such requisition and shall charge the State treasurer with the stamps

thus delivered, and shall keep an accurate record of all stamps coming into and leaving his hands. The State treasurer shall sell the stamps herein provided for only to dealers holding licenses issued as provided in this Act and the moneys received from the sale of such stamps shall be turned into the general fund of the State. The State treasurer shall redeem and make repayment for any unused stamps on written request made by such dealer and pay for same out of any funds derived from the provisions of this Act. It shall be unlawful for a dealer to sell or dispose of such stamps to another dealer or to any person whomsoever, except whenever a person owns or operates more than one place of sale stamps may be distributed to the various places of sale by the main office, but each place of sale must have a separate license and cancellation stamp, and passenger trains operating within this State may stock their dining or buffet cars with cigarettes that have been stamped and cancelled with the cancellation number at division headquarters.

(i) The State treasurer in the enforcement of this Act may call to his aid the attorney general, any county or district attorney or any peace officer. He is authorized to employ such clerks and additional help as may be needed to carry out the provisions of this Act.

(j) Licenses in force at the time this Act takes effect shall continue in force until they expire by their terms or are lawfully revoked.

(k) Any person who shall furnish to any minor by gift, sale or otherwise any cigarette or cigarette paper or wrapper, or any paper made or prepared for the purpose of making cigarettes, or any tobacco in any kind whatsoever

shall be guilty of a misdemeanor, and shall be punished by fine of not less than $25 nor more than $299 or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment.

(1). Any person maintaining a place where cigarettes or cigarette papers or tobacco are sold or kept with intent to sell in violation of the provisions of this Act shall be deemed guilty of keeping and maintaining a nuisance, and the building or place so used for the sale or keeping for sale of cigarettes or cigarette papers or wrappers, or tobacco in violation of the provisions of this Act shall be deemed to be s nuisance, and such persons may be enjoined from maintaining such nuisance and such building or place may be abated as a nuisance, the procedure for actions to enjoin and abate such nuisance, or for contempt in violating an order of injunction, shall be so far as applicable the same as that now provided by the laws of this State for enjoining and abating intoxicating liquor nuisances.

Sec. 2. *Validity of not to be affected.* If any section, sub-section, clause, phrase or word of this Act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this Act.

Approved February 25, 1930.

SUPREME COURT OF THE UNITED STATES.

No. 357.—October Term, 1931.

The Packer Corporation, Appellant, *vs.* State of Utah. } On appeal from the Supreme Court of Utah.

[February 23, 1932.]

Mr. Justice Brandeis delivered the opinion of the Court.

Section 2, of c. 145, Laws of Utah, 1921, as amended by c. 52, § 2, Laws of 1923, and c. 92, Laws of 1929, provides:

"It shall be a misdemeanor for any person, company, or corporation, to display on any bill board, street car sign, street car, placard, or on any other object or place of display, any advertisement of cigarettes, cigarette papers, cigars, chewing tobacco, or smoking tobacco, or any disguise or substitute of either, except that a dealer in cigarettes, cigarette papers, tobacco or cigars or their substitutes, may have a sign on the front of his place of business stating that he is a dealer in such articles, provided that nothing herein shall be construed to prohibit the advertising of cigarettes, cigarette papers, chewing tobacco, smoking tobacco, or any disguise or substitute of either in any newspaper, magazine, or periodical printed or circulating in the State of Utah."

The Packer Corporation, a Delaware corporation engaged in billboard advertising and authorized to do business in Utah, was prosecuted under this statute for displaying a large poster advertising Chesterfield cigarettes on a billboard owned by it and located in Salt Lake City. The poster was displayed pursuant to a general contract for advertising Chesterfield cigarettes, made by the defendant with an advertising agency in the State of Ohio. Both the poster and the cigarettes advertised were manufactured without the State of Utah and were shipped into it by Liggett & Myers Tobacco Company, a foreign corporation. The defendant claimed that the statute violates several provisions of the Federal Constitution; the objections were overruled; and the defendant was convicted and sentenced. On the authority of its recent decision in *State* v. *Packer Corporation*, 297 Pac. 1013, the highest

court of the State affirmed the judgment of the trial court. 2 P. (2d) 114. The case is here on appeal under § 237 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 937.

It is not denied that the State may, under the police power, regulate the business of selling tobacco products, compare *Gundling* v. *Chicago*, 177 U. S. 183, 188; *Austin* v. *Tennessee*, 179 U. S. 343, 348; and the advertising connected therewith, compare *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342, 364, 365; *Tanner* v. *Little*, 240 U. S. 369, 384, 385. The claim is that because of its peculiar provisions the statute violates the Federal Constitution.

First. The contention mainly urged is that the statute violates the equal protection clause of the Fourteenth Amendment; that in discriminating between the display by appellant of tobacco advertisements upon billboards and the display by others of such advertisements in newspapers, magazines or periodicals, it makes an arbitrary classification. The history of the legislation shows that the charge is unfounded. In Utah no one may sell cigarettes or cigarette papers without a license.[1] Since 1890, it has been the persistent policy, first of the Territory and then of the State, to prevent the use of tobacco by minors, and to discourage its use by adults. Giving tobacco to a minor, as well as selling it, is a misdemeanor.[2] So is permitting a minor to frequent any place of business while in the act of using tobacco in any form.[3] Mere possession of tobacco by the minor is made a crime.[4] And smoking by anyone in any enclosed public place (except a public smoking room designated as such by a conspicuous sign at or near the entrance) is a misdemeanor.[5] In 1921, the legislature enacted a general prohibition of the sale or giving away of cigarettes or cigarette papers to any person, and of their advertisement in any form. Laws of Utah, 1921, c. 145, §§ 1, 2. After two years, how-

[1] Laws of Utah, 1921, c. 145, § 1, as amended, Laws of 1923, c. 52, § 1; Laws of 1925, c. 68; Laws of 1930, c. 5, § 1.

[2] Laws of Utah, 1890, c. 65, § 1, as amended, Laws of 1911, c. 51; Laws of 1930, c. 5, § 1 (k).

[3] Laws of Utah, 1921, c. 145, § 3. See Laws of 1923, c. 52, § 1.

[4] Laws of Utah, 1908, c. 135, as amended, Laws of 1911, c. 51; Laws of 1913, c. 59.

[5] Laws of Utah, 1921, c. 145, § 4, as amended, Laws of 1923, c. 52, § 4.

ever, the plan of absolute prohibition of sale was abandoned in favor of a license system. Laws of Utah, 1923, c. 52, § 1. But the provision against advertisements was retained, broadened to include tobacco in most other forms. In 1926, this statute was held void under the commerce clause, as applied to an advertisement of cigarettes manufactured in another State, inserted in a Utah newspaper which circulated in other States. *State* v. *Salt Lake Tribune Publishing Co.*, 68 Utah 187. Thereupon the legislature, unwilling to abandon altogether its declared policy, amended the law by striking out the provision which prohibited advertising in newspapers and periodicals. The classification alleged to be arbitrary was made in order to comply with the requirement of the Federal Constitution as interpreted and applied by the highest court of the State. Action by a State taken to observe one prohibition of the Constitution does not entail the violation of another. *J. E. Raley & Brothers* v. *Richardson*, 264 U. S. 157, 160; *Des Moines National Bank* v. *Fairweather*, 263 U. S. 103, 116, 117. Compare *Dolley* v. *Abilene Nat. Bank*, 179 Fed. 461, 463, 464. It is a reasonable ground of classification that the State has power to legislate with respect to persons in certain situations and not with respect to those in a different one.[6] Compare *Williams* v. *Walsh*, 222 U. S. 415, 420.

Moreover, as the State court has shown, there is a difference which justifies the classification between display advertising and that in periodicals or newspapers: "Billboards, street car signs, and placards and such are in a class by themselves. They are wholly intrastate, and the restrictions apply without discrimination to all in the same class. Advertisements of this sort are constantly before the eyes of observers on the streets and in street cars to be seen without the exercise of choice or volition on their part. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. The young people as well

[6] A contention was made in argument that the State had not in fact acted upon this basis of classification since the statute makes no distinction as to newspapers and magazines circulating solely in intrastate commerce. But the record does not indicate the existence of any such publications. Moreover, the administrative difficulties of any effort to make the applicability of the statute depend upon the character of the circulation of a particular newspaper or magazine would be such as to justify the exclusion of the entire class.

as the adults have those of the billboard thrust upon them by all the arts and devices that skill can produce. In the case of newspapers and magazines, there must be some seeking by one who is to see and read the advertisement. The radio can be turned off, but not so the billboard or street car placard. These distinctions clearly place this kind of advertisement in a position to be classified so that regulations or prohibitions may be imposed upon all within the class. This is impossible with respect to newspapers and magazines." 297 Pac. 1013, 1019. The legislature may recognize degrees of evil and adapt its legislation accordingly. *Miller* v. *Wilson,* 236 U. S. 373, 384; *Truax* v. *Raich,* 239 U. S. 33, 43.

Second. The defendant contends that to make it illegal to carry out the contract under which the advertisement was displayed takes its property without due process of law because it arbitrarily curtails liberty of contract. The contention is without merit. The law deals confessedly with a subject within the scope of the police power. No facts are brought to our attention which establish either that the evil aimed at does not exist or that the statutory remedy is inappropriate. *O'Gorman & Young* v. *Hartford Fire Insurance Co.,* 282 U. S. 251, 257; *Hardware Dealers Mutual Fire Insurance Co.* v. *Glidden Co.,* 284 U. S. 151.

Third. The defendant contends also that the statute imposes an unreasonable restraint upon interstate commerce because it prevents the display on billboards of posters shipped from another State. It does not appear from the record that the defendant is the owner of the posters. Its interest is merely in its billboards located in the State, upon which it displays advertisements for which it is paid. So far as the posters are concerned, assuming them to be articles of commerce, compare *Charles A. Ramsay Co.* v. *Associated Bill Posters,* 260 U. S. 501, 511, the statute is aimed, not at their importation, but at their use when affixed to billboards permanently located in the State. Compare *Browning* v. *City of Waycross,* 233 U. S. 16, 22, 23; *General Railway Signal Co.* v. *Virginia,* 246 U. S. 500, 510. The prohibition is non-discriminatory, applying regardless of the origin of the poster. Its operation is wholly intrastate, beginning after the interstate movement of the poster has ceased. Compare *Hygrade Provision Co.* v. *Sherman,* 266 U. S. 497, 503; *Hebe Co.* v. *Shaw,* 248 U. S. 297, 304. See also *Corn Products Refining Co.* v. *Eddy,* 249 U. S. 427, 433. To

sustain the defendant's contention would be to hold that the posters, because of their origin, were entitled to permanent immunity from the exercise of State regulatory power. The Federal Constitution does not so require. Compare *Mutual Film Corporation* v. *Industrial Commission*, 236 U. S. 230, 240, 241. So far as the articles advertised are concerned, the solicitation of the advertisements, it may be assumed, is directed toward intrastate sales. Compare *Di Santo* v. *Pennsylvania*, 273 U. S. 34. Whatever may be the limitations upon the power of the State to regulate solicitation and advertisement incident to an exclusively interstate business, the commerce clause interposes no barrier to its effective control of advertising essentially local. Compare *Jell-O Co.* v. *Landes*, 20 F. (2d) 120, 121; *International Text-Book Co.* v. *District of Columbia*, 35 App. D. C. 307, 311, 312.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.